Supreme Court, U.S.
FILED

991162 JAN 10 2000

OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1999

SYED ABDULLAH, et al.,

*Petitioners,*

v.

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

## PETITION FOR WRIT OF CERTIORARI

**LINDA KENEPASKE**
*Counsel of Record*
*Attorney for Petitioners*
275 Madison Avenue
New York, New York 10016
(212) 986-5993

*Of Counsel:*
**Robert A. Murtha, Jr.**
**Helene Chowes**

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

99 pp

# PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## QUESTION PRESENTED FOR REVIEW

Petitioners are undocumented aliens primarily from India, Pakistan and Bangladesh who applied to the INS for legal status, at Congress's invitation, under the Special Agricultural Worker ("SAW") statute, 8 U.S.C. 1160. The INS instituted a procedure which required petitioners to have a face-to-face interview with INS staff at a local legalization office. Petitioners paid a fee, and were given appointment slips stating the date, time and place of the interviews. Petitioners spoke little or no English. The INS interviewers did not speak petitioners' languages. The appointment slips did not advise applicants to bring their own interpreters. Competent interpreters were not provided by the INS. The INS denied petitioners' applications. Petitioners filed suit against the INS in the Southern District of New York contending, among other things, that the INS's failure to provide competent interpreters during their legalization office interviews violated federal law and the United States Constitution. The district court granted petitioners' cross-motion for summary judgment under the authority of McNary v. Haitian Refugee, Inc., 498 U.S. 479 (1991) and consistent with dicta in the Eleventh Circuit in Haitian Refugee v. Nelson, 872 F.2d 1555 (11th Cir. 1989), holding that the INS violated petitioners' due process rights by failing to provide them with competent interpreters at their interviews. The Court of Appeals reversed on the ground that the Fifth Amendment's due process clause does not mandate the INS to provide interpreters at legalization office interviews, and granted summary judgment for the INS. The question presented is:

1. Whether the Court of Appeals erred in reversing the district court's determination that the INS's failure to provide competent interpreters during petitioners' legalization office interviews violated federal law and the Fifth Amendment to the United States Constitution.

## LIST OF PARTIES

The parties to this proceeding are as follows:

Syed Abdullah; Mohammad Abdur; Mohammad Tahseen Afzal; Muhammad Zahid Afzal; Choudhury Mohammad Affzal; Mohammad Kamal Ahmed; Nazir Ahmed; Rahim Ahmed; Walid Ahmed; Zhunu Ahmed; Mohammad M. Alam; Akbar Ali; Hessan Bessauony Ali; Rafaqat Ali; Mohammad Shamsul Islam Almaji; Olam Ambia; Mohammad Arif; Ghulam Asghar; Mohammad Khalid Awan; Shahinshah Babar; Mohi Badal; H.M. Oliullah Badsha; Muhammad Munir Butt; Shaheen Akatar Chaudary; Zia Ullah Chaudhry; Abdul Halim Chowdhury; Moffazzal Hossain Chowdhury; Mahmood Choudhury; Motiul Chowhury; Aziz Ahmad Dar; Ahmed Yousuf Darbar; Dev Dutt; Syed Qalb-e-abbas Gardezi; Abdul Ghafoor; Mohammed Ghani; Mohammad Amir Hamza; Anwar Haque; Mohammad Shahidul Haque; Rezia Hasnath; M.D. Nevel Hayat, K.H.I. Hossain; Khadim Hussain; Syed Safdar Hussain; Vishnu Indar; Mohammed N. Islam; Mohammed Sirajul Islam; Mohammad Javed; Naseer Ahmad Javed; Chaudry Jawaid; Gurdip Singh Josan; Mohammad Abul Kalam; Mohammad Kamal; Pradip Karmakar; Mohammad Khalid; Abdul Khan; Mohammad Khan; Gous Khandaker; Mahinder Kumar; Surinder Kumar; Saleem Latif; Hamed Mahmood; Masoud Akhter Malik; Mohammad Rashid Malik; Nisar Malik; Devidas Mansukhani; Syed Sharafat Mashadi; M.D. Shahjal Miah; Akram Muhammad; Mohammad Munir; Kawser Mustafa; Mohammad Kasem Abul Nabi; Abdelrahim Hussin Nasser; Mazhar Naser; Pushpinder Nath; Rizwan Pasha; Chandubhai Patel; Dineshbhai Patel; Naimesh Kumer Patel; Saba Qamar; Abdul Qayyum; Tej Ram; Mohammad Motiur Rahman; Mohammad H. Rahman; Mohammad Rahman; Muhammad Nawaz Ramzan; Nayier Rashid; Husnain Raza; Abdul Rehman; Ali Azhar Rizvi; Abdul Rumi; Riaz Saddique; Gidon Saido; Mohammad Saleem; Hasan Salim; Baten Seraj; Harminder Singh; Jaswant Singh; Joginder Singh; Kulwant Singh; Ranjit Singh; Syed Mohammed Sirajuddin; Satpal S. Taak; Niaz Uddin;

Mohammad Jamal Uddin; Mohammad Komor Uddin; Siraj Uddin; Rafique Uddin; Safar Uddin; Zaka Ullah Warich; Parveen Khan Zafar; Nantu Qamruz Zaman;**

**"Although the official caption for the decision from the Court of Appeals (A1) contains the names of only the petitioners listed above, the following petitioners are also parties."

** MD. Jainal Abedin; Zainal Abdin; Arshad Mustafa Abid; Essam Abouzeid; Mir Nurul Afsar; Abdul-ahad; Mohammad Ijaz Ahmad; Akram Ahmed; Am Shameem Ahmed; Anis Ahmed; Farid Ahmed; Farooque Ahmed; Firoz Ahmed; M.d. Mostaque Ahmed; Mishu Ahmed; Mohammed Benjir Ahmed; Mohammed Jamal Ahmed; Mohammed S. Ahmed; Mohammed Shuhel Ahmed; Mohammed Tufaque Ahmed; Mohbub Uddin Ahmed; Moinuddin Ahmed; Mostaque Ahmed; Muyeen Uddin Ahmed; Quazi Rana Ahmed; Quddus Ahmed; Rashid Ahmed; Rouf Ahmed; Sheikh Ahmed; Simla Ahmed; Syed Minhaz Ahmed; Hameed Akhtar; Janas Akhunzada; Bodrul Alam; Md. Jane Alam; Md. Zahuirul Alam; Mohamed Alam; Mohammad M. Alam; Nurul Alam; Arshad Ali; Arshad Ali; Imtiaz Ali; Taybe Ali; Mohammad Ali; Shaukat Ali; Muhammad Al-Mamoon; Mohammed Nurul Amin; Chaudary Anser; Mohammad Nazir Arain; Mohammad Arshad; Srinivasan Arumugam; Mohammed Ashraf; Mohammad Hassan Ashrarul; Mohammed Awal; Malik Khalid Awan; Mohammad Arshad Awan; Mohammad Rafiq Awan; Abul Kalam Azad; Abdul.maruf Azad; Mohammed Abdul Aziz; Orack. Uddin Babu; Hafizur Rahman Babul; Mohammed Babul; Mohammed Badal; Harbans Singh Badhan; Ma Razzak Badruddin; Mohammad Afzal Baig; Zaka Ullah Bajwa; Syed A Bakar; Chowdhury Golam Baset; Abul Bashar; Raja Farakh Bashir; Abdul Bays; Mostofa Bhuiya; Md. Anisul Hoque Bhuiyan; Md. Mir Hossain Bhuiyan; Rasheed Ahmad Bhutta; Shakeela bibi; Mohammad Irshad Butt; Muhammed Sadiq Butt; Ali Azam Buya; Parminder K Chahal; Ghoolam Rasool Chaudary; Abdul Sattar Muzafar Chaudhary; Ahmad Chaudhry; Ziauddin Chaudhry; Masud Khalid Ghaudry; Nisar Cheema; Mohammad

Bashir Choudhary; Riaz Choudhary; Mohammad Asif Choudhry; Akhtarun Nabi Choudhury; Mohammed Zahur Choudhury; Md. Abdul. Chowdhury; Md. Abdul Chowdhury ; Nurul. Alam Chowdhury; Abdul Muktadir Chowdhury; Ahad Chowdhury; Ahmed Chowdhury; Jewel Chowdhury; Ronju Chowdhury; Qadar Dad; Sujan Das; Ashit Kumar Dey; Robinson Umer Din; Pintu Dutta; Sando Edassery; Ousmane Fall; Nighat Faridi; Ghaziabdul.ghufran;.Abdul Hadi; Mohammad Ali Haidar; Bitan Haidar; Mohammed Haider; Mohammed Razibul Haq; Hasina Haque; Mohammed Haque; Mohammad Barul Haque; Muhammed Emdadul Haque; Abdul Hameed Harey; Md. Emrul Hasan; Abul Hashem; Abul Hasnath;.Rana Hass1n; Jafran Hoque; Mozammel Hoque; Khalid Shaheed Hossain; Mohammed Hossain; Md. Anwar Hossain; Md. Monwar Hossaln; Shakhawat Hossain; Zak1r Hossain; Md. Abul Hossain- SK; Upal Husain; Mohammed Abul Hushain; Delwar Hussain; Manzour Hussain; Munir Hussain; Sajjad Hussain; Mohammed Ijaz; Mohammad Ilyas; Samdani Iqbal; Sheikh Iqbal; Abdul Hashib Islam; Joynul Islam; Md. Hedaytul Islam; Mohammad Isi.am; Mohamed Nasrul Islam; Mohammad Nurul Islam; Mohammad Ruhul Islam; Mohammed Badrul Islam; Mohammmed Safique Islam; Nurul Islam; Reazul Islam; Mohammad Ismail; Zarah Jahan; Mohammed Jahangir; Abdul Jalil; Abdul Jalil; Ahammed Kabir; Bassirou Kane; Mohammed Sikender Karim; Fakhar Kashmiri; Mohd. Kaslam; Md. Abul Khair; Mohammed Abdul Khalique; Abdur Razzak Khan; Akmal H. Khan; Ashraf Khan; Bayazid Khan; Faruk Khan; Faruk Alam Khan; Feeroz Khan; Ghulam Khan; Habib Khan; Habibullah Khan; Ismail. Khan; Kazal Khan; Maqsud Khan; MD. Arman Khan; Mohammad Hassan Khan; Mohammad Javed Khan; Mohammed N.U. Khan; Muhammed Saleem Khan; Nasir Khan; Jahangir Khandaker; Mohammad Khokar; Deepak Kumar; Pawan Kumar; Rajinder Kumar; Ramesh Kumar; Mohammad Latif; Muhammed Lutu; Abul Kalam Mahmood; Arshad Mahmood; Arshid Mahmood; Shahid Mahmood; Amina Malek; Masood Malek; Mohammad Saleem Malik; Shahid Riaz Malik; Sikander Manu; Tahir Maqbool; Budrus Meah; Mohd). Dudu Meah; Sultan Meah; Malek Mia:

Mohammed Rafique Mia; Md. Ataullah Miah; Khalid Mian; Anowar Miha; Imjad Hassan Mirza; Khair Mohammed; Nasir U. Mohammed; Abdul Momin; Khan Mohammed Monzur; Khan Mohammed Monzur; Mohammad Alimosafir; Rahman Ahmad Motiur; Ashraf Muhammad; Kulwant Multani; Mohammed Abdul Mumin; Tahir Munir; Gulam Mustafa; S.M. Golam Mustafa; Vishwa Nath; Mohammed Shaikh Nawaz; Sayeed Nazim; Hamayun M. Nazir; Razia Nazmi; Alam Mohammad Noor; Md. Abdul Noor; Jila Noorbarani; Jashvantrai K. Panwala; Akmr Karim Patwari; Ratan Patwary; Jebunessa Pervin; Aamer Sohail Qureshi; Ghufran Qureshi; Sajik Junaid Qureshi; Fazel Mustafa Rabbi; Ansar Raflque; Mohammad Rafique; Muhammed Rafique; Lutfur Rahman; Mansudur-rahman; Mohammed Fayzur Rahman; Mohammed Muhibur Rahman; Muhamed Aklashur Rahman; Parveen Rahman; Mohammad Alyas Rajput; Lekh Ram; Magid Rashad; Abdur Rashid; Md. Harun Ur Rashid; Mohammad S. Razak; Mohammad Razzaq; Abdur Razzaque; Kanak Reza; Syed Rizvi; Pradip Saha; Abdus Salam; Mohammed Samad; iaqat Ali Saqib; Abdus Salam Sarker; Sheak Azam Sarwar; Abdus Sattar; Mobed U. Shafique; Haji Syed Saddat Ali Shah; Hashmukh N. Shah; Said Ali Shah; MD. Emdadul Haque Shahan; Mohammad Shahbaz; Sheikh Farhat Shahbaz; Habibur Rahim Shahi; Md. Abdus Shahid; Imtiaz Shaida; Malik Zaman Shar; Akter Sharif; Vijay Sharma; Mohammad A Sheikh; Saied Ahmed Siddiqui; Abdul Barek Sikder; Baldev Singh; Charanjit Singh; Dalvir Singh; Gurdip Singh; Hardaman Singh; Harjinder Singh; Jagtar Singh; Pal Singh; Ranvinder Singh; Rawal Singh; Sampuran Singh; Sherjang Singh; Sucha Singh; Surjit Singh; Surjit Singh; Rahman Sipra; Mohamed Solaiman; Rahmatullah Taher; Shaiful A. Talukdar; Prabesh Talukder; Ayaz Tareen; Bahar Uddin; Jalal Uddin; Jamal Uddin; Jamal Mohammed Uddin; Komor Uddin; Mahbub Uddin; Rafique Uddin; Safar Uddin; Mohammed Hamid Ullah; S.m. Wali Ullah; Khalil Ur-rehman; Sm. Abdul Wahed; Rizwan A. Warriach; Mohammad Yaqoob; Raja M. Yaqub; Mohammed Yunus; Kamrul Zaman; Gul Zamir; Jahan Zeb.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| List of Parties. | ii |
| Table of Contents | vi |
| Table of Citations | vii |
| Opinions Below | 1 |
| Basis for Jurisdiction | 1 |
| Statutory Provisions Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 5 |
| I. The Second Circuit's decision conflicts with the Eleventh Circuit's decision in Haitian Refugee Center v. Nelson which addressed the same issue | 5 |
| II. The Second Circuit's decision conflicts with the law enunciated by the Supreme Court in McNary v. Haitian Refugee Center, Inc. | 11 |
| Conclusion | 13 |

## TABLE OF CITATIONS

**Cases Cited:** **Page**

Haitian Refugee Center, Inc. v. Nelson,
694 F. Supp. 864 (S.D. Fla. 1988) ..... 5, 11

Haitian Refugee Center, Inc. v. Nelson,
872 F.2d 1555 (11th Cir. 1989), aff'd
on other grounds, 498 U.S. 479 (1981 ..... 5, 11

Haitian Refugee Center, Inc. v. Smith,
676 F.2d 1023 (5th Cir. 1982) ..... 10

Jang Man Cho v. Immigration & Naturalization
Service, 669 F.2d 936 (4th Cir. 1982) ..... 6

Landon v. Plasencia, 459 U.S. 21 (1982) ..... 7, 10

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... 7, 10

McNary v. Haitian Refugee Center, Inc.,
498 U.S. 479 (1991) ..... 8, 11

**Statutes Cited:**

8 U.S.C. 1160 ..... 1, 2

8 U.S.C. 1160(a)(1)(B)(ii) ..... 2

8 U.S.C. 1160(c) ..... 2

8 U.S.C. 1160(d)(2)(A) ..... 2

8 U.S.C. 1160(d)(2)(B) ..... 2

U.S. CONST. Amend. V ..... 1

**Regulations Cited:**

8 C.F.R. 210.2(a)(1) ..... 2

8 C.F.R. 210.2(c)(2) ..... 2

8 C.F.R. 210.2(c)(2)(iv) ..... 2, 9

8 C.F.R. 210.4(b)(2) ..... 2

**Legislative History cited:**

H.R. Rep. No. 99-682 Pt. I, 99th Cong., 2d Sess. 45 (1986), reprinted in 1986 U.S.C.C.A.N. 5649 ..... 7, 11

## INDEX TO APPENDIX

Appendix A - Decision of United States Court of Appeals for the Second Circuit dated July 8, 1999 ..... A1

Appendix B - Order denying petition for rehearing en banc dated October 12, 1999 ..... A18

Appendix C - Opinion and Order of the United States District Court for the Southern District of New York dated March 29, 1996, judgment entered June 5, 1996 ..... A19

Appendix D - 8 U.S.C. 1160 ..... A57

Appendix E - 8 C.F.R. 210.2(a)(1) ..... A74
8 C.F.R. 210.2(c)(2) ..... A74
8 C.F.R. 210.2(c)(2)(iv) ..... A74
8 C.F.R. 210.4(b)(2) ..... A75

Appendix F- Copy of INS notice for asylum interview .. A76

Syed Abdullah, et al., respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A, infra) is cited at 184 F. 3d 158 (2d Cir.1999). The Order denying the petition for rehearing en banc dated October 12, 1999 (Appendix B, infra) is unreported. The Opinion of the District Court (Appendix C, infra) is reported at 921 F. Supp. 1080 (S.D.N.Y. 1996). 1996).

## BASIS FOR JURISDICTION

The order sought to be reviewed was entered July 8, 1999. It is annexed hereto as Appendix A. The order denying rehearing en banc is dated October 12, 1999. It is annexed hereto as Appendix B. The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the decision in question is 28 U.S.C. 1254 (1).

## STATUTORY PROVISIONS INVOLVED

1. "No person shall be...deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V
2. 8 U.S.C. 1160 (Appendix D, infra.)

## STATEMENT OF THE CASE

This case concerns constitutional and statutory challenges to the INS's practices and procedures in implementing the Special Agricultural Worker ("SAW") program created by the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, 3417-22 (1986) (codified at section 210 of the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. 1160 (the "SAW statute").

The SAW program extended legalization to certain qualifying undocumented aliens who were otherwise admissible and had performed farm labor in the United States for a least 90 days during the 12-month period prior to May 1, 1986. 8 U.S.C. 1160(a)(1)(B)(ii), (c). Petitioners were applicants for adjustment of status under the SAW program. (Court of Appeals Joint Appendix, pp. 43-122, hereinafter referred to as "JA.")

The process of applying for SAW status began at the INS legalization office ("LO") where petitioners paid a $185 filing fee to the INS and submitted applications claiming that they qualified for SAW status. 8 C.F.R. 210.2(a)(1) and (c)(2); JA 43-122. Petitioners were interviewed by LO examiners in the only personal encounter between petitioners and the INS. During the interviews, LO examiners reviewed petitioners' applications and any accompanying supporting documentation. 8 C.F.R. 210.2(c)(2)(iv).

Upon the submission of a non-frivolous application, petitioners could not be excluded or deported, and were issued authorizations to work in the United States. 8 U.S.C. 1160(d)(2)(A) and(B); 8 C.F.R. 210.4(b)(2). Petitioners retained their work authorizations until they received denials of their applications for adjustment of status, when all authorizations were revoked. 8 U.S.C. 1160(d)(2)(B).

Most of the petitioners spoke little or no English when they were interviewed. The quality and level of competence of interpreters, at such times that they were provided by the INS, varied from interview to interview. LO examiners did not make language distinctions among the varying Indian dialects, including

Bangla, Hindi, Punjabi and Urdu. Any Indian or Pakistani interpreter, no matter which language he or she spoke, was in most instances used universally and indiscriminately. For example, a Punjabi interpreter was frequently used to translate for those who spoke Urdu, Hindi or Bangla, even though he or she was not fully competent to interpret those languages. In some instances, friends or family members interpreted. In other instances, no interpreter was present at all. JA 46-47, JA 60, JA 66-67, JA 87, JA 556-557.

There were no court reporters or tape recordings at petitioners' interviews. The only record of the interviews consisted of the LO examiners' handwritten notes. The interviews formed the basis of the LO examiner's recommendations to subsequent levels of administrative review. JA 47, JA 67, JA 87, JA 557.

In opposing petitioners' cross-motion, the INS alleged that competent interpreters were provided, and submitted a declaration by a supervisory legalization officer who claimed that "the New York District Legalization Office provided interpreters for those applicants who were determined to be not capable of speaking English," and that those interpreters "were competent to translate the language of the applicant being interviewed." JA 46-47. In their complaints, petitioners alleged that the INS engaged in an unlawful pattern and practice in adjudicating their applications for SAW status. Among other things, they claimed that they had a due process right to competent interpreters at their INS LO interviews. JA 1868-1903.

The INS moved to dismiss or, in the alternative, for summary judgment. Petitioners cross-moved for summary judgment.

The district court denied the INS's motion and granted the petitioners' cross-motion to the extent that the INS was ordered to vacate the denials of petitioners' applications and readjudicate them in accordance with the principles set forth in the court's opinion and order. In relevant portion, the INS was ordered to provide plaintiffs with competent interpreters at their LO interviews. Appendix C, p. 43.

Judgment was entered June 5, 1996. The INS appealed the

judgment in its entirety. JA 1908-1909.

On July 8, 1999, the Court of Appeals vacated the judgment, reversed the holding of the district court on the interpreter issue, granted summary judgment on that issue in favor of the INS, and remanded the remaining claims for further proceedings in the district court. Appendix A, p. 1.

## REASONS FOR GRANTING THE WRIT

### I. The Second Circuit's decision conflicts with the Eleventh Circuit's decision in Haitian Refugee Center v. Nelson which addressed the same issue

The question of whether a federal district court has jurisdiction to decide whether undocumented aliens applying for SAW status are entitled to a competent interpreter at their INS Legalization Office ("LO") interviews was decided in favor of plaintiffs by the Eleventh Circuit in 1989. See Haitian Refugee Center v. Nelson, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991).

There, as here, plaintiffs claimed that they were entitled to competent interpreters at their LO interviews. See Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. 864 (S.D.Fla. 1988). The district court agreed, and directed the INS to provide "competent translators, at a minimum in Spanish and Haitian Creole, and translators in other languages ...if necessary." Id. at 881.

The Eleventh Circuit affirmed the district court's order, recognizing that the LO interview "constitutes the only face to face encounter between the applicant and the INS allowing for the assessment of the applicant's credibility." 872 F.2d at 1559. The Eleventh Circuit further stated:

> "Few applicants for SAW status speak English. An INS survey of applications received in the Miami district between August 1 and August 24, 1988 indicated that ninety percent of applicants speak either Spanish or Creole. The INS does not provide interpreters at SAW interviews; some LOs, however, have bilingual employees who assist non-English speaking applicants. The INS does not investigate the qualifications of interpreters provided by the applicants. The record of the interview neither identifies the name of the interpreter nor indicates whether an interpreter was used."

Id. at 1560

The Eleventh Circuit further recognized that "[t]he credibility of the applicant is particularly important where documentary evidence of the applicant's employment history is lacking and there is no transcript or recording of the interview." Id. In Nelson, as here, the only memorialization of the interviews was the LO examiner's notes, which were transmitted to higher levels of administrative review, along with recommendations as to whether the application for status should be granted or denied.

While the Eleventh Circuit did not consider whether the failure to provide competent interpreters was a due process violation under the standards set forth in Mathews v. Eldridge, 459 U.S. 21 (1982) (because the INS's "Examinations Handbook" had already directed the interviewer to "'make certain whether the services of an interpreter [were] required' if the person being questioned [did] not speak English'"), 872 F.2d at 1562, the Court noted that "[d]ue process...requires that the interviewer set forth the factual basis for his recommendation with sufficient specificity to permit [higher levels of administrative review and ultimately the court of appeals] to make a decision regarding the recommendation. Referring to the Fourth Circuit's decision in Jang Man Cho v. Immigration & Naturalization Service, 669 F.2d 936, 940 n. 6 (4th Cir. 1982), the Eleventh Circuit further observed that the "reasons for finding [a] witness unbelievable should be fully stated as a prerequisite for appellate review." Id. at 1563. As the Nelson Court recognized, neither a valid recommendation nor an accurate factual basis can possibly be accomplished in the absence of a full and clear understanding on the part of examiner of what the interviewee is trying to communicate.

In this case, the Second Circuit assumed without deciding that plaintiffs are entitled to due process in the adjudication of their SAW applications. Appendix A, p. 10. However, in analyzing the level of process that is due, the Second Circuit erroneously characterized plaintiffs as "facing the government in a posture more similar to that of immigrants requesting admission

at the border than that of aliens defending the legality of their presence in the country at a deportation hearing." Appendix A, p. 10; emphases in original. The Court referred to this honorable Court's decision in Landon v. Plasencia, 459 U.S. 21, 32 (1982), to support its conclusion that due process protects the latter but not the former. Appendix A, p. 10.

In reality, there is no such similarity between SAW applicants and aliens requesting admission at the border. SAW applicants crossed "the border" and made their lives in the United States many years before they applied for SAW status . In enacting IRCA, Congress recognized that while the SAW applicant does not have the legal status of a permanent resident, he or she does have similar long-term presence, family ties and work ties in the United States. Specifically, the House Committee characterized SAW applicants as a "large alien population living and working in the United States who have been here a number of years, have strong family ties here and have contributed to the United States in myriad ways, including through their work and tax dollars." H.R. Rep. No. 99-682 pt. I, 99th Cong., 2d Sess. 45, 49 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5653. This is far removed from the position of the alien who faces the border for the first time in the hope of gaining entry.

The Second Circuit disagreed with the district court's application of the factors set forth in Mathews v. Eldridge, 424 U.S. 319 (1976) in determining the level of process that is due. Appendix A, p. 10. In applying the first Mathews factor, i.e., the interests of the claimant, the Second Circuit reasoned that while plaintiffs have "a significant interest in achieving the benefits of SAW status," that interest is "qualitatively different" from that of an alien defending himself against the government. Appendix A, p. 11-12. Rather, the Court reasoned that:

> "[i]n the SAW context, the government has not sought individuals with the purpose of depriving them of their liberty or expelling them from the country; rather, aliens have affirmatively petitioned the government for a status enhancement, whose validity it is their burden to establish. In such situations, it is reasonable to require petitioners to

> make suitable arrangements for the provision of the proof necessary to meet their burdens."

Appendix A, p. 11.

While it is true that plaintiffs affirmatively petitioned the government for a "status enhancement," it is equally true that they were encouraged to do so by Congress, which directed the Attorney General "to enlist the assistance of a variety of nonfederal organizations to encourage aliens to apply and to provide them with counsel and assistance during the application process." McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991). Congress's invitation is surely empty if the applicant cannot communicate his or her eligibility for the requested benefit in an effective manner, especially where the determination of the applicant's status rests substantially if not principally on the presentation of facts during a face to face interview. The Second Circuit reasons that since Congress has been so generous in enacting IRCA, then those aliens who hope to benefit should at least be required to "make suitable arrangements for the provision of the proof necessary to meet their burdens," Appendix A, p. 11. In other words, the alien should bear the burden of bringing his own interpreter. In light of the fact that the alien himself has little or no English proficiency, he cannot be deemed capable of making the distinction between a competent interpreter and an incompetent one because he lacks the language ability to judge such competence. In his ignorance, the alien may bring with him an interpreter whose skills are as faulty or as lacking as his own.

Indeed, even the INS recognizes the futility of conducting an interview in the absence of a competent interpreters, and it argued in the district court that competent interpreters were in fact provided by the INS. In opposing plaintiffs' cross-motion for summary judgment, the INS provided a declaration by a supervisory legalization officer alleging that "[i]n processing and adjudicating SAW applications, the New York District Legalization Office provided interpreters for those applicants who were determined to be not capable of speaking English," and that

these interpreters "were competent to translate the language of the applicant being interviewed." Court of Appeals Joint Appendix, p. 143.

Moreover, even if, for the sake of argument, the Second Circuit correctly concluded that it was "reasonable to require plaintiffs to make suitable arrangements...to meet their burdens," including making "suitable arrangements for the provision of proof," then it would surely have been the INS's obligation to advise each and every applicant, in advance of the interview, on the INS-generated appointment slip, that a competent interpreter should be brought to the interview because the INS was not obligated to provide one.

In fact, the INS routinely provides such notice on its asylum interview notice:

> If you cannot speak English fluently, you must provide a competent interpreter at least 18 years old who is not your attorney, representative, or witness. Failure without good cause to appear for the interview or to provide a competent interpreter may result in immediate referral to an immigration judge.

Appendix F, infra.

Significantly, asylum applicants have no greater status in this country than the petitioners in this case.

The Second Circuit further disagreed with the district court's assessment of the third Mathews factor, i.e., "the government's interest in avoiding the burdens that would be imposed on it if the claim of entitlement were validated." Appendix A., p. 12. The Court stated:

> "The INS estimates that it received over 1.3 million applications for SAW status. The regulations require a personal interview for each applicant. See 8 CFR 210.2(c)(2)(iv). As all the applicants are (or claim to be) undocumented alien agricultural workers, it may safely be assumed that a high percentage are not fluent in English.

> The applicants in this case alone would require the provision of interpreters in Urdu, Hindi and Bengali. Upholding the rights plaintiffs claim would not doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great."

Appendix A, p. 13.

First, as the Fifth Circuit has stated, an individual's right to due process under the Fifth Amendment is violated when the government creates a right to petition and then makes it impossible to exercise that right. Haitian Refugee Center, Inc. v. Smith, 676 F.2d 1023 (5th Cir. 1982). Here, as the Second Circuit correctly points out, it was the INS, after IRCA was enacted, that instituted the regulation requiring a personal interview. It did so knowing that the interviewee was not fluent in English and that the interviewer was not fluent in Urdu, Hindi, Bangla, or Punjabi. Having instituted the regulations, it was the INS's obligation to efficiently organize the application process. For instance, without undue burden or expense, it could have simply arranged to have interpreters in petitioners' languages available on particular days, and could have advised petitioners' on their appointment slips as to which days the interpreter who spoke their language would be available. Moreover, it is clear from the volume of the SAW applications submitted to the INS (1.3 million by the INS's own estimate), that a portion of the $185 processing fee could have been applied towards competent interpreters for the petitioners.

Finally, the law cannot be so arbitrarily applied as to require the INS to provide competent interpreters in Spanish and Haitian Creole in the Eleventh Circuit, while similarly situated SAW applicants facing the same governmental agency in the Second Circuit who happen to speak principally Urdu, Hindi, Bangla, and Punjabi, are not afforded the same opportunity to be heard when facing the same agency for the exact same purpose.

## II.
## The Second Circuit's Decision Conflicts With the Law Enunciated by the Supreme Court in McNary v. Haitian Refugee Center, Inc.

On the appeal of Haitian Refugee Center v. Nelson, 872 F.2d 1555 (11th Cir. 1989), this honorable Court was presented with one question for review: Whether the SAW statute "precludes a federal district court from exercising general federal-question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the...INS...in the administration of the SAW program." See McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 483 (1991). In McNary, this Court held that a federal district court has jurisdiction to hear "constitutional and statutory challenges to INS procedures" such as those that were raised in the underlying case, Haitian Refugee Center v. Nelson, 694 F. Supp. 864 (S.D. Fla. 1988), including the INS's failure to provide SAW applicants with competent interpreters at their legalization office interviews. Id. at 484.

This Court took note of the House Committee's characterization of the SAW population:

> "Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U.S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars.... [They are] a vulnerable population in the work place.

H.R. Rep. No. 99-682, pt. 1, p. 49 (1986), cited in McNary, supra, at 484.

In reviewing the history of the Nelson case, this Court referred to the district court complaint, noting plaintiffs' allegation that the interview process was "conducted in an arbitrary fashion that deprived applicants of the due process guaranteed by the Fifth

Amendment to the Constitution" in that, among other things, "non-English speaking Haitian applicants were unable to communicate effectively with LO's because competent interpreters were not provided..." Id. at 487-488. This honorable Court repeated the finding of the district court, that a number of INS's practices violated IRCA and were unconstitutional, including the failure of the INS to provide interpreters at SAW interviews:

> "The District Court moreover found that interpreters were not provided at LO interviews, even though many Haitian applicants spoke only Creole and no personnel in a particular LO understood that language, and that no recordings or transcripts of LO interviews were made, despite the fact that the interview 'is the only face to face encounter between the applicant and the INS allowing the INS to assess the applicant's credibility.'"

Id. at 489 fn. 9.

This honorable Court further referred to the district court order that the INS "maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary...." Id.

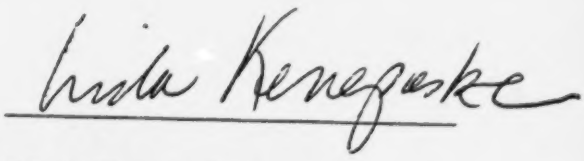
Commenting that the INS was not seeking a review of the district court's ruling on the merits of this issue, this Court concluded that there was no dispute that the INS "routinely and persistently violated the Constitution and statutes in processing SAW applications." Id. at 491.

As such, the Second Circuit erroneously reversed the district court's decision that plaintiffs were entitled to competent interpreters and their SAW interviews, and the question of whether petitioners were or were not provided with competent interpreters is a question of fact which is properly left for the district court to determine.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Linda Kenepaske
Counsel of Record
Attorney for Petitioners
275 Madison Avenue
New York, N.Y. 10016
(212) 986-5993

*Of counsel:*

Robert A. Murtha, Jr.
Helene Chowes

Dated: New York, New York
January 10, 2000

# APPENDIX A

SYED ABDULLAH, et al.,
Plaintiffs-Appellees,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Defendant-Appellant.

Docket No. 96-6206

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

184 F.3d 158; 1999 U.S. App. LEXIS 15146

September 3, 1997, Argued July 8, 1999, Decided

**PRIOR HISTORY:** [**1] Appeal from grant of summary judgment by the United States District Court for the Southern District of New York (Schwartz, J.) finding that the United States Immigration and Naturalization Service employed unconstitutional policies and practices in adjudicating the petitions of plaintiffs for Special Agricultural Worker status under 8 U.S.C. § 1160, and ordering the INS to readjudicate. The Court of Appeals (Leval, J.) vacates the judgment, reverses in part, and remands the remaining claims for further proceedings.

**DISPOSITION:** Vacated the grant of summary judgment in favor of the plaintiffs. Plaintiffs' claim based on failure to provide

interpreters at the hearings or SAW applications, we reversed and directed entry of summary judgment in favor of the INS. Plaintiffs' claims of use of nationality based profiles in violation of equal protection and of irrebuttable presumptions in violation of the Due Process Clause, we vacated the judgment and remanded for trial.

**CORE TERMS:** interpreter, summary judgment, alien, deportation, interview, fraudulent, agricultural, national origin, regulations, nationality, subject matter jurisdiction, judicial review, entitlement, avoiding, irrebuttable presumption, examiners, administrative record, vacate, lawful, failure to provide, ethnicity, profile, jurisdiction to hear, order of deportation, improperly granted, readjudicate, factfinding, defending, repeated, indicia

**COUNSEL:** ROBERT A. MURTHA, JR., New York, N.Y. (Helene Chowes and Steven C. Neil, New York, N.Y., Of Counsel), for Plaintiffs-Appellees.

DIOGENES P. KEKATOS, Assistant United States Attorney, New York, N.Y. (Mary Jo White, United [**2] States Attorney for the Southern District of New York, New York, N.Y., James A. O'Brien III, Special Assistant United States Attorney and Gideon A. Schor, Assistant United States Attorney, Of Counsel), for Defendant-Appellant.

**JUDGES:** Before: MINER, and LEVAL, Circuit Judges, and GRIESA, District Judge.[1]

OPINIONBY: LEVAL

OPINION:
[*160]

---

[1] The Honorable Thomas P. Griesa, United States Chief District Judge of the Southern District of New York, sitting by designation.

LEVAL, Circuit Judge:

Plaintiffs, who are undocumented aliens, brought this suit against the Immigration and Naturalization Service (the "INS"), alleging that it employed unconstitutional policies and practices in denying their petitions for Special Agricultural Worker ("SAW") status under 8 U.S.C.§1160. The district court (Schwartz, J.) granted summary judgment in favor of plaintiffs on three of their claims and ordered the INS to readjudicate. See Abdullah v. INS, 921 F. Supp. 1080 (S.D.N.Y. 1996).

The INS contends that the district court lacked jurisdiction because 8 U.S.C§1160(e)(1) limits federal courts' authority to review "a determination respecting an application for adjustment of status." [**3] We disagree, finding that each of the claims falls within a recognized exception to the jurisdictional bar. As to the merits, we [*161] reverse the court's holding that the Due Process Clause requires the INS to provide plaintiffs with interpreters; on plaintiffs' other claims, we vacate the grant of summary judgment and remand.

BACKGROUND

A. Statutory and Regulatory Scheme

In 1986, Congress enacted the Immigration Reform and Control Act ("ICRA"), which established an amnesty program for agricultural workers. Under the program, an illegal alien who applied for SAW status during an eighteen-month period commencing on June 1, 1987, could have status adjusted to that of an alien lawfully admitted for temporary residence if otherwise admissible to the United States as an immigrant and able to establish residence in the United States during the twelve-month period ending on May 1, 1986, and performance of seasonal agricultural services for at least 90 man-days during that period. See 8 U.S.C.§1160(a)(1).

Under 8 U.S.C.§1160, applicants for SAW status have the burden to prove "as a matter of just and reasonable inference" that they worked the requisite number of days as [**4] agricultural workers. See 8 U.S.C. §§ 1160(a)(1), (b)(3)(B)(iii). To meet this burden, applicants are required to present evidence independent of their testimony, see 8 C.F.R.§210.3(b)(2), such as employer records, pay stubs, or sworn affidavits from "agricultural producers, foremen, farm labor contractors, union officials, fellow employees, or other persons with specific knowledge of the applicant's employment." 8 C.F.R.§210.3(c)(3). Federal regulations provide that the inference to be drawn from this documentation "depends on the extent of the documentation, its credibility and amenability to verification." 8 C.F.R.§210.3(b)(1).

Any alien who submits a nonfrivolous application for SAW status during the eighteen-month application period is granted a work permit authorizing him or her to engage legally in paid employment, and cannot be excluded or deported while his or her application is being processed. 8 U.S.C.§1160(d)(2). If the application for SAW status is granted, an alien becomes a lawful temporary resident and can, in due course, obtain permanent residence status. See 8 U.S.C. § 1160(a)(1)-(2).

INS regulations provide for a personal interview of each [**5] applicant by an INS legalization officer ("LO"). 8 C.F.R.§210.2(c)(2)(iv). If the LO suspects that the application was fraudulent, the officer rates the level of suspicion of fraud on a scale of one to five. Following the personal interview, the LO recommends approval or denial of the application to the INS Regional Processing Facility ("RPF"). If the LO recommends denial and the RPF concurs, the RPF sends applicants a notice of intent to deny setting out the grounds for denial and inviting the applicant to submit further evidence. 8 C.F.R.§103.2(b)(16)(i). The RPF considers any additional evidence submitted and makes a final decision on the application.

An RPF denial of an application for SAW status can be appealed

to the INS legalization appeals union ("LAU" ). 8 C.F.R.§103.3(a)(3)(i). Pursuant to 8 U.S.C.§1160(e)(2)(B), an applicant is permitted to submit "such additional or newly discovered evidence as may not have been available at the time of the determination" by the RPF. The LAU is the highest level of administrative appellate authority.

Under 8 U.S.C.§1160(e)(1), judicial review of "a determination respecting an application for adjustment of [SAW] status" [**6] is generally prohibited; however, 8 U.S.C.§1160(e)(3)(a) permits review of a denial of SAW status in connection with "judicial review of an order of exclusion or deportation." Section 1160(e)(3)(b) provides that review of an order or exclusion or deportation "shall be based solely upon the administrative record established at the time of the review by the [INS] appellate authority." At the time, district courts lacked jurisdiction to review an order of deportation. See 8 U.S.C.§1105a (repealed 1996, [*162] as to orders filed on or after September 30, 1996). Thus, the statute precluded judicial review of an individual denial of adjustment to SAW status except in the context of review by the Courts of Appeals of an order of deportation or exclusion. See McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 486, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991).

B. Procedural History

Plaintiffs are 437 undocumented aliens, primarily from the Indian subcontinent, who applied for and were denied adjustment to SAW status. Blue 2. After unsuccessfully appealing the adverse decisions to the LAU, plaintiffs filed this suit in the Southern District of New York, contending that INS policies [**7] and practices employed in the course of processing and denying their applications violated federal law and the United States Constitution.

The INS moved to dismiss the action for lack of subject matter jurisdiction pursuant to 8 U.S.C.§1160(e)(1). The district court

rejected this argument, holding that plaintiffs' claims did not challenge such review of a determination on an application for adjustment of status, but instead questioned the legality of the INS procedures.

The district court went on to grant summary judgment in favor of plaintiffs on three of their constitutional claims. First, the district court held that the INS had violated the Due Process Clause by applying a "virtually irrebuttable" presumption of fraud to applicants whose proof of employment came from employers on an INS blacklist for suspicion of producing fraudulent documents. Second, the district court held that the INS acted illegally when LO examiners recommended the denial of many SAW applications based wholly or partially on a fraud profile that included ethnic or national origin as a factor. Finally, the district court held that the plaintiffs' due process rights were violated by the INS's failure to [**8] provide interpreters for applicants during the LO interviews.

In granting summary judgment, the district court vacated the INS's denials of plaintiffs' SAW status, and ordered the INS to readjudicate each plaintiff's application according to constitutionally permissible procedures. The INS now appeals.

DISCUSSION

The INS argues that the district court lacked subject matter jurisdiction over plaintiffs' claims pursuant to 8 U.S.C.§1160(e). Alternatively, the INS argues that 1) summary judgment was improperly granted because there remain material factual disputes with respect to plaintiffs' constitutional claims, or that 2) the INS, rather than plaintiffs, was entitled to summary judgment on these claims. We find that the district court did have subject matter jurisdiction, but that summary judgment was improperly granted.

A. Subject Matter Jurisdiction

The INS contends that the district court lacked subject matter jurisdiction over each of plaintiffs' three constitutional claims under§1160(e) of ICRA, which precludes district court review of "a determination respecting an application for adjustment of [SAW] status." Notwithstanding the statute's broad preclusion [**9] of judicial review of INS determinations of status, the Supreme Court's rulings have established that claims of this nature made under such circumstances are within the district court's jurisdiction.

In McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991), the Supreme Court held that§1160(e)(1)'s reference to "a determination" covered only an individual denial of SAW status, and did not deprive district courts of jurisdiction to hear "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." 498 U.S. at 492. The McNary plaintiffs, 17 aliens denied SAW status, asserted the unconstitutionality of several INS policies--the agency's failure to give SAW [*163] applicants notice of or an opportunity to challenge adverse evidence, its refusal to allow applicants to call witnesses on their behalf, its failure to provide competent interpreters for interviews with LO examiners, and its refusal to make a verbatim recording of those interviews. See id. at 487-98.

The McNary Court distinguished claims "alleging a pattern or practice" of unconstitutional conduct from challenges to [**10] individual status determinations, which are denied review by§1160(e)(1). See 498 U.S. at 483. The McNary plaintiffs were not seeking adjudication of entitlement to SAW status (a review of the "determination" of that status), but an opportunity for fair consideration of their applications by the agency. Id. at 495. In addition, the Court reasoned, plaintiffs "would not as a practical matter be able to obtain meaningful judicial review" of those claims upon the review by the Courts of Appeals of an individual applicant's deportation or exclusion order under §1160(e)(3) because such review would be limited to the administrative record,

and the procedures employed by the INS in reviewing the SAW application "did not allow applicants to assemble adequate [administrative] records." Id. at 496. The Court further reasoned that review of INS procedures by Courts of Appeals in the context of an individual deportation order would likely be inadequate because those courts "lack the factfinding and record-developing capabilities of a federal district court." Id. at 497.

We find that plaintiffs' claims are within the range of "challenges to procedures used by [the] [**11] INS" that McNary found subject to review by the district courts. 498 U.S. at 494. Each of the three claims asserts that the INS utilized an unconstitutional practice in the resolution of SAW applications. Furthermore, as to each, the INS's failure to make an adequate administrative record of the SAW decision would effectively prevent a court of appeals, while reviewing an individual order of deportation or exclusion, from assessing the validity of the claim with respect to denial of SAW status. Finally, to the extent that a plaintiff's success would depend on proving that an unconstitutional presumption or procedure was, in fact, being employed in the guise of individualized review of his application, that could not likely be established in the court of appeals on review of a simple deportation order upon a record limited to that individual's file; it would require factfinding capabilities not possessed by the court of appeals.

For all those reasons we find that these three claims -- failure to provide interpreters, employment of an "irrebuttable presumption" of fraud in cases where the applicant's qualifying agricultural employment was alleged to be with an employer suspected [**12] of fraudulent certification, and an unconstitutional presumption of fraud based on national origin -- are subject to judicial review in the district courts under the rule of McNary. The district court has jurisdiction, not to determine the plaintiffs' eligibility for SAW status, but solely to determine their entitlement to lawful procedures.

We reject the INS's argument that Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 125 L. Ed. 2d 38, 113 S. Ct. 2485 (1993) ("CSS"), mandates a different result. In CSS, the court held that challenges to certain INS regulations on status adjustment were not ripe for review until a plaintiff's application had been denied pursuant to those regulations. See id. at 59. In dicta, the CSS Court suggested that even when a plaintiff's claim became ripe, a district court might not have jurisdiction to hear it, since unlike the "procedural objections" raised in McNary that could not be meaningfully considered absent development of a factual record, a challenge to the regulations relied on by the INS would be capable of review by a court hearing an appeal from a deportation order. Id. at 60-61. [*164] The INS argues that this passage [**13] from CSS establishes that district courts lack jurisdiction to hear "substantive," as opposed to "procedural," challenges to INS' review of SAW applications, and that plaintiffs' claims fall within that "substantive" category.

We disagree with the INS's understanding of the Supreme Court's opinion. CSS expressly reaffirmed McNary's holding that a district court may exercise jurisdiction to adjudicate pattern-or-practice claims against the INS, as opposed to individual denials of status adjustment. See 509 U.S. at 55-56. The Court made no distinction between the "substantive" or "procedural" nature of the claim raised, and further stated that a district court would have subject matter jurisdiction over the regulatory challenge brought by the CSS plaintiffs as a class (assuming that other requirements, such as ripeness, were met). See id. A challenge to the lawfulness of regulations is quite different from these claims; the existence and meaning of the regulations are apparent to the court of appeals without need for factfinding. Moreover, the passage on which the INS relies turns on an important rationale of McNary: that an adequate administrative record [**14] is a prerequisite to the preclusion of district court review. See 509 U.S. at 60-61. The absence of that record here, as in McNary, makes§1160(e)(1)'s jurisdictional bar inapplicable. We conclude that the district court properly exercised subject matter jurisdiction over plaintiffs' three

claims.

B. Merits of the Claims

1. Interpreters. The INS contends that the district court erred in holding that the Fifth Amendment's Due Process Clause mandates that the government provide competent interpreters in the native languages of the SAW applicants, during interviews with the INS Legalization Officers. We agree and reverse.

For purposes of this inquiry, we assume without deciding that the plaintiffs are entitled to the protections of the Due Process Clause in the adjudication of their SAW applications -- a point that the INS contests. See Haitian Refugee Ctr., Inc. v. Nelson, 872 F.2d 1555, 1562 (11th Cir. 1989), aff'd on other grounds, McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991). We note, however, that petitioners face the government in a posture more similar to that of immigrants requesting [**15] admission at the border than that of aliens defending the legality of their presence in the country at a deportation hearing. See Landon v. Plasencia, 459 U.S. 21, 32, 74 L. Ed. 2d 21, 103 S. Ct. 321 (1982) (holding that Due Process protects the latter and not the former ).

In evaluating due process claims, we look at the factors set forth in Mathews v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976 ). The factors are 1) the interests of the claimant, 2) the risk of erroneous deprivation absent the benefit of the procedures sought and the probable value of such additional safeguards, and 3) the government's interest in avoiding the burdens entailed in providing the additional procedures claimed. See id. at 334-35; see also Landon, 459 U.S. at 34-35 (applying Mathews factors to analyze constitutional sufficiency of procedures at alien exclusion hearing).

We respectfully disagree with the district court's appraisal of those factors in the context of the plaintiffs' claim of entitlement to have

interpreters provided by the INS at LO interviews.

It is true that in defending against criminal prosecution, accused defendants have a constitutional right [**16] to be provided with the services of an interpreter. See United States ex. rel. Negron v. New York, 434 F.2d 386, 390-91 (2d Cir. 1970). We have also held that aliens claiming a risk of political persecution abroad have a right to [*165] competent translations of deportation and exclusion proceedings. See Augustin v. Sava, 735 F.2d 32, 38 (2d Cir. 1984); see also Gonzales v. Zurbrick, 45 F.2d 934, 937 (6th Cir. 1930); In re Tomas, 1987 BIA LEXIS 9, 19 I. & N. Dec. 464, 465, 1987 WL 108944 (BIA 1987). Other circuits have recognized similar protections in the context of other deportation and exclusion proceedings. See Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980); Niarchos v. INS, 393 F.2d 509, 511 (7th Cir. 1968). But we believe there is an important distinction between those proceedings and one in question here.

We have no doubt that plaintiffs have a significant interest in achieving the benefits of SAW status. Nonetheless it is qualitatively different from the interest of one defending against criminal prosecution, deportation or exclusion. In the SAW context, the government has not sought out individuals with the purpose of depriving them of their liberty or expelling them [**17] from the country; rather, aliens have affirmatively petitioned the government for a status enhancement, whose validity it is their burden to establish. In such a situations, it is reasonable to require petitioners to make suitable arrangements for the provision of the proof necessary to meet their burdens. The distinction between government-initiated proceedings seeking to affect adversely a person's status and hearings arising from the person's affirmative application for a benefit seems particularly meaningful in the context of the ICRA, a statute whose Congressional co-sponsor characterized as one of "extraordinary . . grace and generosity," and whose beneficiaries, when applying for amnesty, have been found not to be entitled to the same privileges and status as lawful permanent residents. 129 Cong.

Rec. 12814 (1983) (remarks of Sen. Simpson); Matter of Chavez-Calderon, 1993 BIA LEXIS 13, 20 I. & N. Dec. 744, 748, 1993 WL 495141 (BIA 1993); see also Lyng v. Payne, 476 U.S. 926, 942, 90 L. Ed. 2d 921, 106 S. Ct. 2333 (1986) (contrasting, for due process purposes, "legitimate claims of entitlement" by persons already receiving government benefits with claims made by new applicants).

We believe [**18] that the "claimant's interest" factor specified in Mathews entails examination of a subfactor: the nature and objective of the proceeding in which the claim of right is asserted. When government seeks to inflict punishment on an individual, or to deprive him of liberty or property or to inflict some significant mandatory change on the conditions of the individual's life, that individual's interest in being furnished with an interpreter at government expense is far greater than when the individual affirmatively initiates a proceeding seeking the benefits of a "generous" statutory exception.

We believe this Mathews factor favors the INS rather than the plaintiffs in the context of this controversy.

We also disagree with the district court's assessment of the third Mathews factor -- the government's interest in avoiding the burdens that would be imposed on it if the claim of entitlement were validated. In our view, the government has a substantial interest in avoiding that burden, which the district court failed to recognize.

The district court, following reasoning of the Eleventh Circuit in Haitian Refugee Ctr. Inc. v. Nelson, 872 F.2d at 1562, concluded that the government [**19] has no interest in avoiding the burden of providing interpreters. In Nelson, the Eleventh Circuit took note of an INS handbook that instructs examining officers to make interpreters available. The court reasoned that, because INS procedures contemplate the provision of an interpreter, the agency has no interest in avoiding the burden, and concluded, "it is

unnecessary for us to consider the third Mathews factor." Id. The district court followed Nelson in discounting any government interest to counterbalance the plaintiffs' interest in successfully establishing their claims. See 921 F. Supp. at 1097-98.

[*166] We disagree. In deciding, over government opposition, whether the due process clause requires the government to assume this burden, the government's prior voluntary assumption of the burden does not render the burden nonexistent. Rule or no rule, the burden remains. The INS estimates that it received over 1.3 million applications for SAW status. The regulations require a personal interview for each applicant. See 8 CFR§210.2(c )(2 )(iv). As all the applicants are (or claim to be ) undocumented alien agricultural workers, it may safely be assumed that a high [**20] percentage are not fluent in English. The applicants in this case alone would require the provision of interpreters in Urdu, Hindi and Bengali. Upholding the right plaintiffs claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great.

We conclude in considering the third Mathews factor that the burden on the government to provide interpreters for LO interviews would be considerable.

We recognize that plaintiffs have a significant interest in obtaining an accurate determination of their eligibility for SAW status. The district court may also have been right to find that interpreters would increase the accuracy of the INS's assessments, and that applicants who, because of a limited ability to speak English, cannot convincingly respond to examiners' questions will be disadvantaged. The government may thus decide that its own interests, as well as the applicants', are best served by providing interpreters. But we disagree with the district court's view that where, as here, aliens are petitioning for a special, statutorily-created benefit, the Constitution requires the [**21] government to provide interpreters. As the Supreme Court

emphasized in assessing the adequacy of procedures at exclusion hearings, our task is limited to "determining what procedures would satisfy the minimum requirements of due process," not to imposing procedural mandates "simply . . . because the [ ] court may find them preferable." Plasencia, 459 U.S. at 35.

We therefore reverse the court's ruling and remand with directions to enter summary judgment for the INS on this claim.

2. Improper Reliance on Plaintiffs' Ethnicity or National Origin.

The INS next challenges the district court's grant of summary judgment on plaintiffs' claim that it engaged in unconstitutional discrimination on the basis of ethnicity and national origin in reviewing their SAW applications. We agree with the INS that summary judgment was improperly granted. The factual record was insufficiently developed as to the nature and extent of the INS' reliance on plaintiffs' ethnicity and national origin. We therefore remand for further proceedings.

Based on its review of the LO examiners' notes taken during their interviews with plaintiffs and their evaluations of plaintiffs' supporting documentation, [**22] the district court determined that the INS had employed an impermissible discriminatory nationality-based profile to find fraud and deny applications. The finding was based primarily on seven application files, called to the court's attention by plaintiffs, in which the examiner's notes make reference to a fraud profile that includes the fact that the applicant was of Indian or Pakistani nationality, or was from the Punjab or other region. The court noted that it found such references in many more than the seven files. See 921 F. Supp. at 1094-95.

We agree with the district court that the Constitution does "not permit an immigration official, in the absence of [lawful quota] policies, to . . . discriminate on the basis of race and national origin." Bertrand v. Sava, 684 F.2d 204, 212 n. 12 (2d Cir. 1982);

see also Wong Wing Hang v. INS, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) (denial of suspension of deportation to eligible alien would be abuse [*167] of discretion if it "rested on an impermissible basis such as an invidious discrimination against a particular race or group").

Nonetheless, we think that evidence before the district court was insufficient to support [**23] the grant of summary judgment that the INS had engaged in unconstitutional discrimination. If, for example, the INS found a pattern of fraudulent applications including similar devices, such as repeated use of identical form documents previously found to be fraudulent, or repeated use in answer to stock questions of identical answers previously found to be fraudulent, occurring with regularity among applicants of a particular nationality, region or city, the observed pattern might result not from any greater inclination of persons of one nationality than another to commit fraud, but from the tendency of persons who have recently emigrated to this country to maintain a community with persons from the same place of origin. Thus, while the INS would be constitutionally forbidden to assume that persons of one nationality are more inclined than others to fraud, it would not be barred from observing repeated indicia of similar fraud from persons of one community, and consequently from looking more carefully at applications from others of the same community bearing similar indicia of fraud. See Bertrand, 684 F.2d at 214-15 & n. 14; United States v. Jackson, 652 F.2d 244, 248-49 (2d [**24] Cir. 1981) (where witness told police crime was committed by person of certain race, race of suspect was one relevant factor in determining whether police had reasonable suspicion to stop and question suspect ).

The INS asserts that when an application was denied with reference to the applicant's ethnicity or national origin, "the LOs recommended denial not because of nationality or ethnicity but because of the application's suspicious resemblance to demonstrably fraudulent applications submitted by fellow nationals." To meaningfully evaluate that claim, however, more

evidence is needed than was available to the district court at summary judgment.

We conclude that the evidence was insufficient to permit a determination by summary judgment whether there were in fact repetitive indicia of a pattern of fraud among an identifiable group of applicants; if so, whether the INS drew permissible inferences from the pattern in processing individual applications; or whether it was engaging in constitutionally prohibited bias. We therefore vacate the grant of summary judgment and remand for trial.

3. "Irrebuttable Presumption" of Fraud Based on Claimed Employer. The INS also appeals [**25] from the grant of summary judgment in plaintiffs' favor based on the district court's conclusion that the INS utilized an irrebuttable presumption of fraud. Plaintiffs contended that, with respect to certain employers who had been convicted of submitting fraudulent certifications of agricultural employment in support of SAW applications, the INS presumed conclusively that all applications claiming agricultural employment by those employers were fraudulent. Plaintiffs claimed that the use of such a conclusive presumption violates due process.

We find no adequate basis in the record for the grant of summary judgment. Indeed, the district court's own observations seem to undercut the grant of summary judgment to many of the plaintiffs.

In our view, the records examined by the district court were inadequate to justify the conclusion on summary judgment that the INS employed an irrebuttable presumption, as opposed to a reasonable inference, of fraud in the case of employers convicted of precisely the type of fraud in question. Furthermore, the court found only that "at least in some cases, defendant erected a presumption of fraud which was virtually irrebuttable." Even if the conclusion [**26] was warranted that the INS had impermissibly done so in some cases, that would not warrant vacating the INS's [*168] determinations on the cases of all plaintiffs claiming

employment by those employers.

As the court did not conclude that the agency had employed an illegal irrebuttable presumption in the case of all (or even a large number) of plaintiffs claiming employment with the suspect employers, the findings do not support the judgment requiring the INS to readjudicate the applications of all the plaintiffs.

CONCLUSION

We vacate the grant of summary judgment in favor of the plaintiffs. As to the plaintiffs' claim based on failure to provide interpreters at the hearings or SAW applications, we reverse and direct entry of summary judgment in favor of the INS. As to plaintiffs' claims of use of nationality based profiles in violation of equal protection and of irrebuttable presumptions in violation of the Due Process Clause, we vacate the judgment and remand for trial.

Service: LEXSEE«
Citation: 1999 us app lexis 15146

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of October one thousand nine hundred and ninety-nine.

---

Abdullah, et al.

Plaintiffs-Appellees,

v

Dkt No: 96-6206

Immigration and Naturalization Service,

Defendant-Appellant.

---

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Plaintiffs-appellees Syed Abdullah, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT**

KAREN GREVE MILTON, Acting Clerk

By: Beth J. Meador
Beth J. Meador,
Administrative Attorney

BEST AVAILABLE COPY

**APPENDIX C**

SYED ABDULLAH, et al.,

Plaintiffs,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Defendant.

JAINAL ABEDIN, et al.,

Plaintiffs,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Defendant.

**92 Civ. 8199 (AGS), 93 Civ. 3985 (AGS)**

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**921 F. Supp. 1080; 1996 U.S. Dist. LEXIS 3935**

March 29, 1996, Dated April 1, 1996, FILED

**CORE TERMS:** examiner, interview, profile, interpreter, alien, fraudulent, farm, documentation, suspected, agricultural, legalization, rebut, process right, credible, recommended, suspicion, requisite, judicial review, summary judgment, recording, credibility, qualifying, regulation, ethnicity, specific evidence, recommend, administrative review, plaintiffs claim, burden of proof, recommendation

**COUNSEL:** [**1] For Plaintiffs: Robert A. Murtha, Jr., Esq., New York, New York.

For Defendant: James O'Brien, III, Esq., Assistant United States Attorney, U.S. Department of Justice, Civil Division, New York, New York.

**JUDGES:** ALLEN G. SCHWARTZ, U.S.D.J.

**OPINIONBY:** ALLEN G. SCHWARTZ

**OPINION:** [*1083] OPINION & ORDER

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

The above-referenced consolidated action is before the Court on defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted, or, in the alternative, for summary judgment, and plaintiffs' cross-motion for summary judgment. For the reasons stated herein, defendant's motion is denied and plaintiff's cross-motion is granted to the extent set forth below.

BACKGROUND

Plaintiffs are more than 400 illegal aliens from India or Pakistan who challenge the defendant's adjudication of their applications for Special Agricultural Worker status under the Immigration Reform and Control Act of 1986 (the "Act" or "IRCA")[1] as being violative of the Act and of the Due Process clause of the Fifth Amendment to the United States Constitution.

The Act established, inter alia, the [**2] Special Agricultural Worker (SAW) amnesty program in recognition of the "special labor needs of Western growers of perishable commodities." H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 50, reprinted in 1986 U.S.C.C.A.N. 5649, 5654. The SAW program required the Attorney General to adjust the status of any alien farmworker who could establish (1) his or her admissibility in the United States as an immigrant and (2) that he or she had resided in the United States and performed at least 90 days of qualifying agricultural work during the 12-month period prior to May 1, 1986. The Act

---

[1]Pub. L. No. 99-603, 100 Stat. 3359.

directed the Attorney General to adjust the status of these aliens first to that of special agricultural workers lawfully admitted for temporary residence and then to aliens lawfully admitted for permanent residence. See 8 U.S.C. § 1160 (a)(2).

Aliens seeking SAW status were required to file an application, supporting documents and a fee with either an Immigration and Naturalization Service ("INS") legalization office ("LO") or a "qualified designated entity" ("QDE"), which, under the Act, included "qualified voluntary organizations and other qualified State, local community, farm labor organizations, [**3] and associations of agricultural employers." 8 U.S.C. § 1160(b)(2). Upon the submission of an application and fee, the applicant was ordinarily issued employment authorization, which was in effect until final action on the application was completed. See 8 U.S.C. § 1160(d)(2)(B).

Regulations adopted by the INS to administer the program provide for a personal interview of each applicant at an LO. See 8 C.F.R. §§ 210.2(c)(2)(iv) (1990). Under the Act, the applicant has the burden of proving, by a preponderance of the evidence, that he or she worked the requisite 90 days of qualifying agricultural labor. See 8 U.S.C.§1160(b)(3)(B). If the LO examiner suspected that the application was fraudulent, he or she was expected to specify the level of suspicion of fraud on a scale of 1 to 5. Following the interview, the examiner would make a recommendation of approval or denial to an INS Regional Processing Facility ("RPF"), which reviewed the file and issued a decision. See 8 C.F.R.§210.1(q). If the RPF intended to deny the application, a notice of intent to deny was sent to the applicant, who then had 30 days to submit further evidence in support of his or her application. [**4] [*1084] If the final decision was a denial, the applicant was notified and advised of the right to appeal. On appeal, the applicant could submit "such additional or newly discovered evidence as may not have been available at the time of the determination" of the RPF. 8 U.S.C§1160(e)(2)(B). The appeal was reviewed first by the RPF. If the RPF determined that its original decision was correct, it forwarded the file to the

Legalization Appeals Unit ("LAU") for a final written decision.

The Act mandates criminal penalties for making a fraudulent statement or supplying a fraudulent writing or document in connection with the filing of a SAW application. 8 U.S.C.§1160(b)(7). Any person convicted of such a crime may be fined, imprisoned for up to five years, or both. Aliens convicted of fraud under the Act are excludable from the United States. Id.

Plaintiffs applied for SAW status, but their applications were ultimately denied by the LAU. They make the following claims regarding defendant's administration of the SAW program: (1) plaintiffs' applications were routinely denied because proof of their employment was based on documents provided by farm employers who were on an INS blacklist [**5] of persons either suspected or convicted of fraud in connection with SAW applications, with no showing that fraudulent documents were supplied to the individual applicant in question; (2) the INS unlawfully classified plaintiffs by their ethnic group identification within the Indian and Pakistani communities and recommended denial of applications on the basis of membership in ethnic groups predetermined to be suspected of fraud; (3) plaintiffs were not provided with competent interpreters at their LO interviews; (4) plaintiffs were not permitted to confront and cross-examine defendant's witnesses or to inspect the adverse evidence considered by defendant in denying their applications; and (5) the INS did not make any transcripts or recordings of the LO interviews, making it impossible to challenge defendant's accounts of the interviews in a meaningful way.

DISCUSSION

I. Subject Matter Jurisdiction

Defendant moves to dismiss the complaint for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). Federal question jurisdiction would ordinarily cover the statutory and constitutional claims before the Court. See Perales

v. Thornburgh, [**6] 967 F.2d 798, 805 (2d Cir. 1992). However, defendant argues that the Act's judicial review provisions are exclusive and deprive the Court of jurisdiction in this case. The Act provides for limited judicial review of the administrative denial of a SAW application, such that:

> (e)(1) There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.
>
> . . .
>
> (e)(3)(A) There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

8 U.S.C.§1160(e)(1), (3)(A).

However, in McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991), an action brought to challenge the INS's procedures in administering the SAW program, the Supreme Court held that district courts have jurisdiction to hear constitutional and statutory challenges to INS procedures. Id., 498 U.S. at 484, 111 S. Ct. at 892; see also Rahim v. McNary, 24 F.3d 440, 442 (2d Cir. 1994) ("The district court properly exercised subject matter jurisdiction over [**7] the consolidated complaints on the ground that IRCA's limitation on judicial review does not preclude review of a challenge to the procedures used by the INS in implementing the statute"); Jean v. Nelson, 727 F.2d 957, 980 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846, 86 L. Ed. 2d 664, 105 S. Ct. 2992 (1985) (district court had jurisdiction over suit which alleged "widespread abuses by immigration officials" as pattern or practice violating the Refugee Act); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1033 (5th Cir. Unit B 1982) ("insofar as the first three counts set forth matters [*1085] alleged to be part of a pattern and practice by immigration officials to violate the

constitutional rights of a class of aliens they constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction"); compare Ahmed v. Meissner, 896 F. Supp. 138, 141, n. 5 (S.D.N.Y. 1995) (jurisdiction is lacking where each plaintiff contends that the INS made specific errors in adducing and weighing the evidence set forth in his individual application").[2] [**8]

Thus, the question presented by defendant's motion is whether plaintiffs allege"a pattern or practice of procedural due process violations," McNary, 498 U.S. at 483, 111 S. Ct. at 892, by the INS in its administration of the SAW program, or, as defendant contends, plaintiffs' claims amount to a challenge of the INS's denials of their applications on their merits. The distinction the Court must draw is "one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." Haitian Refugee Center v. Smith, 676 F.2d at 1033.

In McNary, the plaintiffs alleged, inter alia, that the INS (1) imposed an unlawful burden of proof in cases of suspected fraud, by requiring applicants to produce corroborating evidence in addition to affidavits to prove the performance of the requisite 90

---

[2]Several actions brought in this district against the INS, in which the plaintiffs alleged that the INS improperly weighed the evidence in their SAW applications, have been dismissed for lack of subject matter jurisdiction. See Ahmed v. Meissner, supra; Basharath v. Meissner, Order, No. 94 Civ. 226 (CBM) (S.D.N.Y. Sept. 16, 1994); Malik v. Meissner, No. 94 Civ. 8289 (SAS) (S.D.N.Y. June 20, 1995); Nadeem v. I.N.S., Order, No. 94 Civ. 2617 (JES) (S.D.N.Y. July 19, 1995). These actions are distinguishable from the instant action due not only to the large number of plaintiffs in this case, but also to the claims they assert, most notably the claim that the INS employed a fraud profile based on ethnicity in adjudicating their applications.

days of employment; (2) issued notices of denial which failed to state [**9] the specific reasons for denial and provided incorrect information for purposes of appeal; and (3) imposed an interview procedure which violated the applicants' Fifth Amendment right to due process by failing to provide interpreters, failing to allow the applicants to rebut adverse evidence, and refusing to allow the applicants to present witnesses on their own behalf. Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. 864, 866 (S.D. Fla. 1988), aff'd, 872 F.2d 1555 (11th Cir. 1989), aff'd, McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991). The district court found that these claims were beyond the scope of administrative review, as they attacked the manner in which the entire program was being implemented, and that "to deny jurisdiction would be to allow illegal agency action to go unchallenged." Id., 694 F. Supp. at 873-74. The Supreme Court agreed that the plaintiffs' claims amounted to allegations of a "pattern or practice of procedural due process violations," over which the district court had properly exercised jurisdiction. McNary, 498 U.S. at 483, 111 S. Ct. at 892.

Plaintiffs' allegations in this case are [**10] similar to those made in McNary, and this action, in essence, follows up on certain issues raised in that case. In McNary the district court ordered that the plaintiffs, who were unaware of the adverse evidence against their applications, be given an opportunity to examine the evidence, rebut it and offer additional evidence prior to a determination of their applications. Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. at 880. Here, plaintiffs claim that they have not been given the opportunity to examine the adverse evidence, and even though they were permitted to offer additional evidence to counter the INS's finding of suspected fraud, the presumption raised by the INS's finding was virtually irrebuttable. Further, the district court in McNary ordered that "the Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary." Id., 694 F. Supp. at 881. The Eleventh Circuit, in affirming this portion of the district [*1086] court's order, stated that the provision was "properly tailored to

meet the requirements of due process," but that the "if necessary" [**11] phrase did "not mean that interpreters in other languages shall automatically be required, absent court order, in the case of an [sic] non-English speaking applicant who speaks neither Spanish nor Haitian Creole." Haitian Refugee Center, Inc. v. Nelson, 872 F.2d at 1562, n. 13. Plaintiffs in this action allege that they were not provided with interpreters who could speak their native languages[3] and assert that aliens applying for SAW status have a due process right to be heard "in a meaningful manner." Goldberg v. Kelly, 397 U.S. 254, 267, 90 S. Ct. 1011, 1020, 25 L. Ed. 2d 287 (1970). In addition, plaintiffs make the very serious allegation that, in denying their applications, the INS employed a profile of suspected fraud based on membership in an ethnic group.

Defendant argues that plaintiffs "list approximately 51 different [**12] categories in which their applications were denied, and assert chiefly different claims regarding each category rather than a pattern and practice." Defendant's Mem. of L. at 14. The different "categories" to which defendant refers, however, relate mainly to the various employers for whom plaintiffs claim to have worked. However, there is no meaningful distinction to be made, for example, between the 64 plaintiffs who claim that their applications were summarily denied because their putative employer was convicted of supplying one fraudulent document to a SAW applicant, and the 54 plaintiffs who claim that they were denied SAW status because a different alleged employer pled guilty to providing fraudulent documentation to applicants other than those plaintiffs. That the alleged employers are different people, and the fact patterns relating to each employer vary somewhat, is of no import. The plaintiffs in each of defendant's "categories" claim, inter alia, that their applications were improperly denied because of suspected fraud, even though the INS had no specific evidence of fraud in their individual cases.

---

[3]Plaintiffs allege that a number of them, who speak Urdu or Bangla, were given interpreters who speak Spanish or Hindi, while others were not provided with any interpreter

Thus, regardless of the fact that plaintiffs do not share one employer [**13] and one fact pattern in common, they make the same substantive claim against the INS; to group their claims into artificial categories would elevate form over substance.

Defendant points to Reno v. Catholic Social Services, Inc., 509 U.S. 43, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993), as authority for the proposition that the jurisdictional provision of the Act, which precludes judicial review of "a determination respecting an application," also precludes judicial review of challenges that merely refer to or rely on the denial of any individual application. Since plaintiffs refer the Court to documents in their application files as evidence of procedures violative of due process, defendant asserts that the procedural nature of their claims is only so much window-dressing for claims which seek to resolve the ultimate merits of their applications. In Catholic Social Services, Inc., the Supreme Court reaffirmed its holding in McNary, stating

> We said that the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. . . . We therefore decided that the language setting the limits of [**14] the jurisdictional bar describes the denial of an individual application and thus applies only to review of denials of individual applications. The INS gives us no reason to reverse course, and we reject its argument that§1255a(f)(1) precludes district court jurisdiction over an action challenging the legality of a regulation without referring to or relying on the denial of any individual application.

Catholic Social Services, Inc., 113 S. Ct. at 2494-95 (citations and internal quotations omitted). [4] The Court did not [*1087] state

---

[4]The Supreme Court held in Catholic Social Services, Inc., supra, that aliens challenging regulations promulgated pursuant to IRCA were

that a district court lacks jurisdiction if the challenge to the INS's practices and procedures in administering the Act refers to or relies on the denial of any individual application, and it is inconceivable that it would. If plaintiffs are precluded from offering the application files of individuals denied SAW status as proof of unlawful procedures employed by the INS, as defendant suggests, then they would be deprived of the ability to support their allegations with documentary evidence. We reject the contention that the law would countenance such a result. [**15]

Plaintiffs are not asking this Court to review their individual applications or to hear their testimony for the purpose of determining, on the merits, whether or not they are entitled to SAW status. Rather, plaintiffs challenge the patterns and practices utilized by defendant in its review process and request that the Court order defendant to readjudicate their cases employing constitutionally proper procedures that are consistent with the Act. See Perales v. Thornburgh, 967 F.2d at 807 ("even if we grant relief in this case, plaintiffs' success on the merits of their applications does not follow as a matter of course").

Defendant also argues that plaintiffs' claim regarding the INS's failure to provide competent interpreters is not justiciable because plaintiffs did not raise this issue before the LO, the RPF and the LAU, thereby failing to exhaust their administrative remedies. Defendant concedes that due process claims are generally exempt from the exhaustion requirement because the agency does not have jurisdiction to adjudicate them, see Bagues-Valles v. I.N.S., 779 F.2d 483, 484 (9th Cir. 1985), but argues that where such a claim involves a procedural error correctable [**16] by the

---

required to show that their claims were ripe by demonstrating that they had taken every affirmative step possible in applying for legalization but were blocked because of the challenged regulations. In that action, plaintiffs were two classes of aliens who were eligible for legalization, but who had not necessarily applied for adjustment of status. Id., 113 S. Ct. at 2490, 2492. In contrast, plaintiffs in the instant action applied for SAW status and were denied by the LAU.

administrative tribunal, it must be presented and exhausted. See Vargas v. I.N.S., 831 F.2d 906, 908 (9th Cir. 1987). Plaintiffs respond that the INS's failure to provide them with competent interpreters was not a procedural error, but an unconstitutional practice, and, in any event, administrative review would be futile.

In general, claims not raised in the administrative proceedings in question may be dismissed for failure to exhaust administrative remedies. Correa v. Thornburgh, 901 F.2d 1166, 1171 (2d Cir. 1990). The justiciability doctrine is designed

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott Labs., Inc. v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 [**17] L. Ed. 2d 681 (1967). However, this requirement is excused under certain circumstances, including where administrative review would be futile, see Honig v. Doe, 484 U.S. 305, 327, 108 S. Ct. 592, 606, 98 L. Ed. 2d 686 (1988), and where administrative action will not resolve the merits of the claim, as in a constitutional attack on administrative procedures. Public Utilities Commission v. United States, 355 U.S. 534, 539-40, 78 S. Ct. 446, 450-51, 2 L. Ed. 2d 470 (1958).

The Eleventh Circuit addressed justiciability with regard to the plaintiffs' claims in McNary. The Court first found that the

statutory requirement of exhaustion was inapplicable[5] n5 because the plaintiffs did not seek substantive review of any individual ruling respecting their status, but challenged the
adequacy of the procedures employed by the INS in administering the SAW program.
Haitian Refugee Center, Inc. v. Nelson, 872 F.2d at 1561. Turning to the
judicially-created exhaustion doctrine, the Court stated,

[*1088] exhaustion is not required, however, where the administrative remedy will not provide relief commensurate with the claim. The nature of plaintiffs' constitutional challenge of INS procedures [**18] is such that relief at the administrative review level would have been unlikely. The chances are remote that the INS would have considered substantial revision of the procedures devised for the processing of SAW applications at the behest of a single alien mounting a constitutional attack in the context of administrative review of her application. We therefore conclude that the exhaustion doctrine did not bar the district court's assertion of jurisdiction. . . .

Id., 872 F.2d at 1561 (citations omitted).

We find this reasoning persuasive. Plaintiffs' claim that they were not provided with competent interpreters amounts to a constitutional attack. Defendant's assertion that the failure to provide competent interpreters was merely a procedural error is belied by [**19] the fact that the same "error" allegedly occurred in hundreds of cases. Moreover, defendant also takes the position that aliens applying for SAW status have no statutory or due process right to competent interpreters, demonstrating the futility of administrative review. See El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 747 (9th

---

[5]Section 1105a(c) of the Act provides that "an order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right . . . ." 8 U.S.C.§1105a(c).

Cir. 1991) ("where the agency's position on the question at issue appears already set, and it is very likely what the result of recourse to administrative remedies would be, such recourse would be futile and is not required"). Finally, even if the Court applies the analysis articulated by the Supreme Court in Abbot Labs., supra, disregarding the exceptions to the justiciability doctrine, defendant does not prevail: the issue is fit for judicial decision, for it is of a legal, not factual, nature, and the plaintiffs would endure significant hardship were the Court to refuse to consider their claim. Id., 387 U.S. at 149, 87 S. Ct. at 1515.

Accordingly, the Court finds that it has jurisdiction over all the claims asserted in this action, and defendant's motion to dismiss for lack of subject matter jurisdiction [**20] is denied.

II. The INS's Adjudication of the SAW Program

Defendant moves to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. Plaintiff cross-moves for summary judgment. Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, and all inferences and ambiguities are resolved in favor of the party against whom summary judgment is sought. Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994) (citations omitted).

a. Did the INS Employ an Improper Procedure in Denying Plaintiffs' Applications Based on Employer Fraud?

Plaintiffs assert that the INS routinely denied any application which claimed employment for a suspect employer, notwithstanding any additional evidence that was submitted or the fact that there was no direct evidence of fraud in their particular

[**21] applications. The INS contends that it properly relied on evidence such as the conviction records of alleged employers who had pleaded guilty to supplying fraudulent documents in other instances and who had provided documents in support of plaintiffs' applications, in determining that plaintiffs' evidence was not credible.

Plaintiffs have a constitutionally protected right to seek SAW status under the Act and corresponding regulations. Perales v. Reno, 48 F.3d 1305, 1313 (2d Cir. 1995); see also Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. at 878. In McNary, the Supreme Court recognized that "even disregarding the risk of deportation, the impact of a denial on the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures in the [SAW] application process." Id., 498 U.S. at 491, 111 S. Ct. at 895. Moreover, due process "is violated when the government creates a right [*1089] to petition and then makes it utterly impossible to exercise that right." Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. at 878; see also Haitian Refugee Center v. Smith, 676 F.2d at 1039; Rahim v. McNary, 24 F.3d at 443 (due process [**22] requires that SAW applicants be "given a full and fair opportunity to establish their eligibility").

In the adjudicative context, "due process entitles a person to factfinding based on a record produced before the decisionmaker and disclosed to that person, and an individualized determination of his interests." de la Llana-Castellon v. I.N.S., 16 F.3d 1093, 1096 (10th Cir. 1994) (citations omitted). The INS may not substitute "official notice" of evidence adverse to plaintiffs' applications in place of an analysis of the facts of each applicant's individual case Kaczmarczyk v. I.N.S., 933 F.2d 588, 594-95 (7th Cir.), cert. denied, 502 U.S. 981, 112 S. Ct. 583, 116 L. Ed. 2d 608 (1991); see also Castillo-Villagra v. I.N.S., 972 F.2d 1017, 1029 (9th Cir. 1992) (due process requires that applicant be allowed an opportunity to rebut officially noticed facts).

Plaintiffs claim that the INS adjudicated their applications using

"procedure by presumption," rather than considering each application individually, in violation of their due process rights. See Stanley v. Illinois, 405 U.S. 645, 656-57, 92 S. Ct. 1208, 1215, 31 L. Ed. 2d 551 (1972) ("Procedure by presumption [**23] is always cheaper and easier than individualized determination" but violates due process). Plaintiffs refer the Court to specific application files, such as that of Mr. Oliullah Badsha, as examples of defendant's alleged blacklisting of suspect employers.

Plaintiff Badsha's SAW application included an employment letter and work record from an alleged employer named Larry Marval. The LO examiner recommended denial of Badsha's application based on suspected fraud and checked the "Level of Suspicion" box denoting the highest level of suspected fraud. The examiner's notes read in their entirety:

> The applicant fits the profile of highly suspect applicants who have been seeking legalization benefits as S.A.W.s, under Sect. 210 of I.R.C.A.
>
> The documents submitted appear to be very similar in appearance as well as content. In most cases, the affiants themselves, growers or Farm Labor Contractors, have been listed as highly suspect in the Document Intelligence Alert Bulletins provided by E.R.P.F.
> The documents submitted are signed and sworn to by one such growers/Farm Labor Contractors, namely by Larry Marval from N.J.
>
> For this reason, I recommend that this application [**24] be denied as there is enough reason to suspect that the documents might be fraudulent.

Defendant's Ex. B at 375.

Consequently, the RPF informed Badsha that it intended to deny his application. In its letter to Badsha, the RPF stated,

> Parry Del Rio Produce, Inc. owns the property at 318 Ward Avenue, Bordentown, New Jersey which is where Larry Marval claims a farm was operated by Royal Crest Meats. Officers of the corporation stated that neither Larry Marval nor Royal Crest Meats had a lease for the property at 318 Ward Avenue. The caretakers of the property stated that Larry Marval did not farm at 318 Ward Avenue.[6]
>
> . . .
>
> In addition, the dates on the employment letter signed by Larry Marval do not correspond with the alleged work record also signed by Larry Marval.

Id. at 373. The RPF informed Badsha that he could submit evidence to overcome its stated reasons for denial and a final decision would be rendered in 30 days. In response, Badsha apparently submitted "an alleged work record, not signed, and other various receipts and documents not in [his] name," which the RPF found to "have no probative value." Id. at 371. In denying Badsha's application, [**25] the RPF noted that Marval had [*1090] admitted supplying fraudulent SAW documentation and pled guilty to charges of conspiracy and making false statements. The RPF concluded that Badsha's evidence failed to establish that he resided in the area of the putative farm during the period of claimed employment or that he had performed the requisite employment, and "no evidence was submitted with this case which would prove that adjoining property was utilized in connection with any alleged agricultural employment." Id. at 372.

On appeal to the LAU, Badsha asserted that Marval was forced to plead guilty to fraud and stated that a federal judge had granted

---

[6]RPF notices of intent to deny sent to other plaintiffs who claimed to have worked for Larry Marval contain the same or similar language.

Marval's motion to withdraw his guilty plea. Badsha submitted a photocopy of a picture of himself with Marval. The LAU dismissed his appeal, noting that Marval had since been convicted of conspiracy and making false statements, and [**26] that over one thousand sets of fraudulent documents on behalf of SAW applicants had been produced as a result of the "conspiracy orchestrated by Mr. Marval and others." Id. at 366.

The Act and corresponding regulations provide that an applicant may satisfy the burden of proof by providing either "documentation which shows qualifying employment," such as payroll records, or "documentation sufficient to establish the requisite employment or residence as a matter of just and reasonable inference," such as affidavits by agricultural producers, foremen, farm labor contractors, fellow employees, or other persons who have knowledge of the applicant's employment. 8 U.S.C.§1160(b)(3)(B), 8 C.F.R.§210.3(b)(1). The "inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification . . . ." 8 C.F.R.§210.3(b)(1) (emphasis supplied). An applicant's own testimony, uncorroborated by other credible evidence, is insufficient to meet the evidentiary burden. 8 C.F.R.§210.3(b)(3). If the applicant establishes that he or she has performed the requisite qualifying employment as a matter of just and reasonable [**27] inference, "the burden then shifts to the Service to disprove the applicant's evidence by showing that the inference drawn from the evidence is not reasonable." 8 C.F.R.§210.3(b)(1). With respect to the LO interview, the regulations provide that the "applicant must establish to the satisfaction of the examining officer during an interview that his or her claim to eligibility for special agricultural worker classification is credible, and that he or she is otherwise admissible to the United States . . . ." 8 C.F.R.§210.2(c)(4)(i) (emphasis supplied).

Thus, under the regulations, it is proper for the INS to assess the credibility of an applicant's evidence and apply that assessment in determining whether the evidence establishes the requisite

employment by a just and reasonable inference. Badsha's application file certainly shows that the INS maintains some sort of list of employers suspected or convicted of fraud. This, in itself, does not violate plaintiffs' rights.

However, plaintiffs claim that once an alleged employer was determined to be suspect, the INS refrained from performing any further investigation and adamantly refused to grant any weight to any evidence offered [**28] by an applicant that might contradict its predetermined conclusion. Such a procedure, plaintiffs contend, violates both the Fifth Amendment and the "spirit and letter" of the Act, in that defendant created an irrebuttable presumption of fraud, yet found no specific evidence of fraud in their applications.

Plaintiffs point to the fact that Larry Marval pled guilty to fraud in connection with only one SAW application, and in his plea agreement with the government it was stipulated that Marval conducted farm operations and employed a number of aliens as farm laborers; yet, all plaintiffs claiming to have worked for Marval were denied SAW status. Moreover, in denying their applications the INS used the same or similar language evincing a lack of individualized examination.

Similarly, the alleged employer Lee Artis Breedlove, an established farm labor contractor, pled guilty to fraud in connection with providing SAW documentation. The INS discovered from payroll records provided to it as part of a plea agreement that Breedlove employed 260 aliens, and from these records [*1091] the INS determined that 10 employees had performed the requisite qualifying employment. Plaintiff Chowdhury Golam [**29] Baset was not among the ten. Baset submitted two letters of employment signed by Breedlove and argued that (1) he could not be responsible for the inaccuracies in the employment records maintained by Breedlove and (2) because he was clandestinely employed, he could offer no additional documentation such as pay stubs, W-2 forms and bank account receipts. In dismissing Baset's appeal, the LAU stated,

> [t]he Service acknowledges the fact that Mr. Breedlove was a farm labor contractor. However, given the detrimental information obtained by the Service, Mr. Breedlove's agricultural employment does not result in according veracity upon the applicant's agricultural employment claim. It is noted that the applicant's denial is not based on insufficient employment evidence but rather because the documentation submitted was deemed not credible.

Defendant's Ex. B at 1294.

Plaintiff Mohammed Islam also claimed that he was employed by Breedlove for at least 90 days during the statutory period. When the RPF notified Islam that it intended to deny his application because it did not consider affidavits and other documentation signed by Breedlove to be credible, Islam submitted five additional [**30] affidavits from individuals who attested to his agricultural employment and an additional affidavit signed by Breedlove. In the additional affidavit, Breedlove denied providing a list of his employees to the INS and stated that Islam worked for him for 90 days from May 1985 to May 1986. The RPF, and subsequently the LAU, acknowledged that Islam had submitted additional documentation, but found that he failed to "rebut or overcome the adverse evidence obtained by the Service . . . ." Id. at 1232. Neither the RPF nor the LAU, however, described the additional documentation submitted by Islam, or explained why these documents were not credible or did not rebut the presumption of fraud created by Breedlove's guilty plea. The RPF simply noted, "These documents do not overcome the previously mentioned derogatory information." Id. at 1241. The LAU explained that

> there is no mandatory type of documentation required with respect to the applicant's burden of proof; however, the documentation must be credible. All documents submitted must have an

> appearance of reliability, i.e., if the documents appear to have been forged, or otherwise deceitfully treated or obtained, the documents [**31] are not credible.

The adverse evidence acquired by the Service [i.e. Breedlove's payroll records] directly contradicts the applicant's claim to have performed qualifying agricultural employment for Mr. Breedlove at C.W. Hendrix Farm. This, combined with Mr. Breedlove's subsequent guilty plea and the applicant's inability to directly address or credibly rebut the adverse evidence acquired by the Service, conveys a strong appearance of unreliability on the part of the applicant's documentation. As such, the documentation submitted by the applicant initially and on appeal cannot be accepted as credible evidence meeting his burden of proof or overcoming the evidence acquired by the Service.[7]

Id. at 1233. The LAU's reasoning appears to have been the following: Islam was not able to "credibly rebut" the INS's adverse evidence, therefore the documents Islam submitted to rebut that adverse evidence were not credible. [**32]

Such circuitous reasoning reveals that, in at least some cases, defendant erected a presumption of fraud which was virtually irrebuttable. Once the defendant determined that an application was suspect because it relied on documents signed by noncredible individuals, defendant appears to have viewed all subsequently submitted evidence as equally noncredible, or tainted by a presumption of fraud. That Larry Marval or Lee Artis Breedlove are not credible affiants is not at issue, nor is the proposition that the Act and corresponding regulations allow defendant [*1092] to draw an inference from an applicant's evidence based on whether or not the evidence is credible and amenable to verification. However, the fact that an employer pled guilty to, or was convicted of, supplying fraudulent documents to SAW

---

[7] This or similar language appears in many of plaintiffs' LAU dismissals. See, e.g. Defendant's Ex. B at 801-02, 1073, 1153, 1190.

applicants must not result in an automatic denial of SAW status to aliens who did in fact perform the requisite employment for that employer. In other words, if Larry Marval did indeed provide fraudulent documents to only one SAW applicant, all 64 of the plaintiffs who claim to have worked for Marval cannot be that one applicant. Defendant is required to make a good faith effort to separate the [**33] fraudulent from the non-fraudulent applications, analyzing the facts of each applicant's individual case. See Kaczmarczyk v. I.N.S., 933 F.2d at 594-95. In short, the presumption of fraud must not be irrebuttable.

Plaintiffs urge the Court to go one step further and hold that defendant must have specific evidence which shows that an applicant's documents are in fact fraudulent in order to deny SAW status. The Court declines to do so. The only case plaintiffs cite in support of this proposal is Stanley v. Illinois, supra, in which the Supreme Court stated that "procedure by presumption" violates due process. Id., 405 U.S. at 656, 92 S. Ct. at 1215. However, this Court's holding that the INS's presumption of fraud must by rebuttable, not irrebuttable, satisfies the requirements of Stanley.

In Stanley, the Court struck down an Illinois statutory scheme which provided that the children of unmarried fathers, upon the death of the mother, were declared dependents of the State, without proof of neglect or a hearing as to the father's parental fitness. Under the statute, the unfitness of an unmarried father was presumed as a matter of law and not subject to challenge [**34] through the process of a hearing or the submission of evidence. The Court held that the statute's presumption of unfitness of an unmarried father violated the Due Process Clause of the Fourteenth Amendment. Id., 405 U.S. at 658, 92 S. Ct. at 1216.

In the instant action, plaintiffs are afforded the opportunity to present additional evidence to rebut the presumption of fraud raised by the INS's evidence which adversely affects the credibility of plaintiffs' previously submitted documents. Moreover, the presumption is factual, not legal, in nature. So long as it is not an irrebuttable presumption, which the Court herein

holds that it may not be, plaintiffs' due process rights are not violated.

Plaintiffs also contend that to deny SAW status on the grounds of suspected fraud, without specific evidence that the application contains fraudulent documents, contravenes the intent of Congress in promulgating the Act. Plaintiffs rely on the following statement contained in House Conference Report No. 1000, pertaining to the burdens of proof set forth in the Act:

. . . courts have dealt with fact patterns involving employee loss of records, destruction or falsification of records [**35] by employers, and other difficult circumstances where precise evidence of hours worked is lacking.

This problem is compounded in agriculture, where pay records may only show piece rate units completed. While this Act will require evidence of hours worked, the lack of hourly records for agricultural employees (which could result from small employer exemptions from wage and hour laws as well as from employment by farm labor contractors or others whose recordkeeping practices are deficient), has led the Conferees to conclude that fairness dictates they create a presumption in favor of worker evidence, unless dispoved [sic] by specific evidence adduced by the Attorney General.[8]

H.R. Conf. Rep. No. 1000, 99th Cong., 2d Sess. 97 (1986), reprinted in 1986 U.S.C.C.A.N. 5840, 5853 (emphasis supplied). [**36]

---

[8]The remainder of this paragraph reads, "This approach rejects any possibility that a mechanistic formula for translating piece rate units picked into hours worked could satisfy this subsection's requirements. Rather the Conferees intend the experience gained under the Fair Labor Standards Act to govern. If an alien is able to produce evidence showing only piece rate units picked, then any day on which piece rate work was performed shall be deemed to satisfy the man-day requirements to this Act."

[*1093] It is well established that "when we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." Demarest v. Manspeaker, 498 U.S. 184, 190, 111 S. Ct. 599, 604, 112 L. Ed. 2d 608 (1991); see also Ardestani v. I.N.S., 502 U.S. 129, 112 S. Ct. 515, 519-20, 116 L. Ed. 2d 496 (1991) ("The starting point in statutory interpretation is the language of the statute itself. . . . The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances when a contrary legislative intent is clearly expressed"). Only where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters," may the Court "adopt[] a restricted rather than a literal or usual meaning of [a statute's] words . . . [so as not to] thwart the obvious purpose of the statute." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S. Ct. 3245, 3250, 73 L. Ed. 2d 973 (1982).

Such is not the case here. The language of the Act is not ambiguous and imposes no "specific evidence" requirement. Moreover, Congress easily could [**37] have included such language, had it so desired. Instead, it afforded the INS a certain amount of discretion in determining whether an applicant has met his or her burden of proof "as a matter of just and reasonable inference." 8 U.S.C.§1160(b)(3)(B)(iii). The reasonableness of any inference depends to some extent on the credibility of the evidence submitted, as the Act's regulations mandate. The statute then provides that the burden of proof shifts to the Attorney General "to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be drawn from the evidence." Id. (emphasis supplied). Congress did not require the Attorney General to show that an applicant's documents were themselves fraudulent or in error, but rather opted for a less stringent burden of negating the reasonableness of the inference.

Even if the Court looks to the passage in the House Conference Report noted above, that language does not clearly express a contrary legislative intent. See Ardestani v. I.N.S., 112 S. Ct. at

520. The Conferees were recommending an approach that "rejects any possibility that a mechanistic formula for translating piece rate units picked [**38] into hours worked could satisfy" the qualifying employment requirements. 1986 U.S.C.C.A.N. at 5853. The passage is not directly concerned with the issue of specific evidence of fraud raised in this action. In short, the Court declines to find that the language of the Act is ambiguous or contrary to legislative intent.

b. Did the INS Improperly Deny Plaintiffs' Applications Based on an Ethnic Profile?

Plaintiffs allege that defendant "engaged in a wholesale pattern and practice of classifying plaintiffs by their ethnic group within the Indian and Pakistani communities, recommending denial and ultimately denying every application where defendant had pre-determined, prior to any individual plaintiff ever setting foot in defendant's local office, that the group of which plaintiff was a member was either guilty of committing fraud or was suspected of having submitted fraudulent documentation." Plaintiff's Reply Mem. of L. at 3 (emphasis in original). Plaintiffs refer the Court to seven application files in which the LO examiners' notes include references to an Indian and/or Pakistani fraud profile. Defendant responds that plaintiffs' evidence is insufficient, and further argues [**39] that the LO's recommendations were not final. Defendant points out that there is no evidence that the RPF's or LAU's decisions reflect the usage of an ethnic profile.

The use of a fraud profile based on ethnicity unquestionably violates due process; that the applicants are illegal aliens is of no import. In Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982), the Second Circuit stated that the discretion afforded the Attorney General by the Immigration and Nationality Act to deny parole to unadmitted aliens "may not be exercised to discriminate invidiously against a particular race or group . . . ." Id., 684 F.2d at 212; see also Jean v. Nelson, 727 F.2d at 963 (remanding to district court for determination as to "whether lower-level INS officials have abused their discretion by discriminating on the

basis of national origin in violation of facially neutral instructions [*1094] from their superiors"). In addition to the danger of discrimination, profiles based on race or ethnicity deprive applicants of the individualized determination of their interests to which they are entitled. See Rhoa-Zamora v. I.N.S., 971 F.2d 26, 33 (7th Cir. 1992), cert. denied, 508 U.S. 906, 113 S. [**40] Ct. 2331, 124 L. Ed. 2d 243 (1993). Similarly, in the criminal law context, ethnicity or race may not be viewed by law enforcement officials as an indicator of suspicious behavior. See Whitfield v. Board of County Commissioners, 837 F. Supp. 338, 344 (D. Co. 1993) ("Without particularization as to a specific person, transaction or incident, the naked inference would be that race correlates to criminal behavior. Such an equation of race with suspicious criminal activity would be nothing more than a racist assumption, and . . . profile stops may not be predicated on unconstitutional discrimination based on race, ethnicity or state of residence"); United States v. Restrepo, 890 F. Supp. 180, 193 (E.D.N.Y. 1995) (investigatory stop based on ethnicity and out of state license plate violated Fourth Amendment).

In light of the seriousness of plaintiffs' allegation, the Court sets forth herein the seven incidences of alleged ethnic profiling to which the plaintiffs refer in their submissions.

The LO examiner's notes regarding plaintiff Kawser Mustafa read in their entirety:

> The applicant fits the "profile" of highly suspect applicants of Indian/Pakistani nationality all coming [**41] from the region of Punjab. Due to past experiences involving the above applicants seeking legalization under Sect. 210 (SAW 2), we have reason to suspect that the documents presented by such applicants may have been obtained fraudulently. I recommend that this application be denied.

Defendant's Ex. B at 303. The examiner checked the box denoting

the highest level of suspicion of fraud[9] and recommended denial of Mustafa' s application.

Regarding the application of plaintiff A. Umer Din Robinson, the LO examiner wrote:

> claim entry without inspection across the Mexican border; claim employment in farm labor; --described process of planting in hot house, of harvesting and cultivating. -- Alleged when he arrived in U.S. farming was the only work available since he has no papers. --Alleged he was dismissed in May and learned from other people from his country that construction labor is available; --because of similar pattern and profiles [**42] have been established on similar nationalities of Pakistan, recommend denial.

Id. at 592. In this case, the examiner recommended denial but did not check a "level of suspicion" box.

The LO examiner who interviewed plaintiff Zaman Shar Malik recommended denial of his application based on a level five suspicion of fraud. The examiner's notes on Malik read:

> The applicant fits the "profile" of highly suspect applicants of Indian/Pakistani/Bangladeshi/Sri Lankan nationality who, during the past several months have been steadily seeking legalization

---

[9]There are five levels of suspicion, five being the highest.

> benefits under Sect. 210 of I.R.C.A. Based on the close similarity of the documents submitted, the dates of employment, always within the prescribed limits, the duration of the employment, almost always within the minimal range prescribed by the law, there is a strong suspicion that the applicants are not bona-fide applicants and that they may have obtained their documents through fraudulent means. I recommend that this application be denied.

Id. at 1014.

The examiner who interviewed plaintiff Ahmed Darbar noted that he submitted work records, affidavits of growers and an employer letter in support of his application. [**43] The examiner recommended denial, however, based on a level five suspicion of fraud, noting:

The documentation is deemed suspect due to the following reasons. Farm related documents were obtained last week, letters are photo copied form letters and the applicant has no knowledge of farming. Applicant [*1095] comes within a pattern of Indian citizens who claim they entered the U.S. in 1984 or 1985 and enter into agricultural labor for the minimum period of man days required to qualify for Group II SAW. Fraud highly suspected. Recommend Denial.

Id. at 972 (emphasis in original).

The LO examiner recommended denial of plaintiff Arshi Mahmood for suspected fraud at level four. After summarizing how the applicant came to be in the United States, the examiner wrote:

He said he harvested tomatoes, corn, squash and peppers. He said farm was big, he couldn't elaborate on size, but he said he worked with 50 people. Applicant said he lived on farm with 2 friends.

Applicant said he is a sandwich man in a restaurant making $ 250 a wk. Applicant said he worked in the upholstry [sic] business in Pakistan. This case falls into fraud saw [sic] common in agric. workers [**44] from India & Pakistan.

Id. at 48.

Regarding the application of plaintiff Shahinshah Babar, the LO examiner did not recommend denial, but noted:

> Due to the high incidence of fraud related to this phase of legalization, the fact that Subject is presently employed in industry other than agriculture and that Subject is of a particular ethnic [sic] group that is allegedly involved in obtaining fraudulent documentation to substantiate (his) claim for legalization, it is requested that a thorough review of this petition and all relating documents' be conducted to ascertain the validity and veracity of said petition.

Id. at 283.

The LO examiner who interviewed plaintiff Ali Rafaqat recommended denial of his application based on a level four suspicion of fraud, but added that the recommendation should be reversed if fraud was not found. The examiner's notes read:

> Denied-- Suspected Fraud. Pattern has been developing with Indians & Pakis [sic] in agricultural work. Verify Employer.

Id. at 575.

The INS argues that plaintiffs have pointed to "a mere seven instances in which the LO mentioned that the applicant was a member of an ethnic [**45] group-- Indian or Pakistani-- that had demonstrated a pattern of submitting fraudulent SAW documents." Defendant's Reply Mem. of L. at 16. However, the Court finds that evidence of an ethnic profile exists in many more than these seven applications. See, e.g., Defendant's Ex. B at 112 ("Applicant comes within profile of alien applicant from Punjab or India"); id. at 145, 3069, 8400, 9067 ("Subject is of a particular ethnic [sic] group that is allegedly involved in obtaining fraudulent documentation"); id. at 151 ("I recommend denial of this application because the applicant's application fits the profile of the other highly suspect Indian/Pakistan SAW applicants"); id. at 242, 3785, 4549, 8506 ("The applicant fits the "profile" of highly suspect applicants of Indian/Pakistani/Bangladeshi/Sri Lankan nationality who, during the past several months have been steadily seeking legalization benefits"); id. at 255 ("Applicant comes within profile of alien applicant from Punjab or India"); id. at 398 ("Applicant meets profile of India/Pakistan nationals applying for amnesty under Group 2 of the Special Agricultural Workers . . . These applications are highly suspect [**46] and I recommending [sic] denial in this case"); id. at 6717 ("Application fits general profile of previously submitted fraudulent Punjabi applicants"); id. at 3436 ("Applicant fits the profile of the East Indians who are filing false applications"); id. at 4475 ("Per memo 9-28-88 this file to DAU since all Pakistani's claiming SAW eligibility from work in Texas are suspect"). Moreover, the fact that the examiners in some cases did not mention the word "profile" in their notes, does not necessarily mean that an ethnic profile was not at work in those cases as well. Undoubtedly, it is rare to find actual evidence of an impermissible profile, rather than having to analyze statistical evidence suggesting its existence.

In some application files, the LO examiner noted that specific

documents submitted by the applicant appeared to be fraudulent[10]; [*1096] however, in many cases, the applicants' documents are not mentioned, much less analyzed, and the examiner recommended denial based entirely on the profile. For example, plaintiff Kawser Mustafa, Munir Hussain, Mohammad Arif, and Gurdip Josan all received recommendations of denial from the LO based on a level five suspicion of fraud. [**47] The examiner's notes in each case recite the exact same language, which bears repeating:

> The applicant fits the "profile" of highly suspect applicants of Indian/Pakistani nationality all coming from the region of Punjab. Due to past experiences involving the above applicants seeking legalization under Sect. 210 (SAW 2), we have reason to suspect that the documents presented by such applicants may have been obtained fraudulently. I recommend that this application be denied.

Id. at 434, 303, 4754, 5845. All of these applicants had submitted various documents, including passports, employer affidavits, and affidavits from growers, foremen, farm labor contractors, or union officials. The examiner did not refer to any of these documents specifically, but rather found them to be suspicious due to past experiences involving other applicants of Indian and Pakistani nationality.

Plaintiff Zaman Shar Malik's [**48] examiner referred to the submissions of all applicants fitting the "profile" and found that all such applicants "are not bona-fide applicants and that they may have obtained their documents through fraudulent means."[11] Id. at

---

[10]In such cases, the examiner noted that documents were photocopies or "form letters."

[11] See supra at 29.

1014. Therefore, without undertaking an analysis of this particular applicant's evidence, the examiner recommended denial of Malik's application based on a level five suspicion of fraud.

In short, the record strongly indicates that many of plaintiffs' applications were adjudicated by the LO, in whole or in part, with reference to a profile based on their identity with a particular group. Such adjudication violates our most basic principles and has no place in a process designed to afford an applicant a certain amount of individual consideration.

Defendant also argues, in essence, that since the LO's recommendations were not final decisions, any ethnic profiling that took place at the LO level is irrelevant. This argument lacks merit. Impermissible [**49] profiling at any level of the decision-making process is unconstitutional, and the fact that such profiling occurred at one level cannot but taint the entire process. Defendant presents no authority that would persuade the Court otherwise.

c. Do Plaintiffs Have a Due Process Right to a Competent Interpreter?

Plaintiffs claim that their due process right to be heard "in a meaningful manner," Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 1020, 25 L. Ed. 2d 287 (1970), was violated by the INS's engaging in a "wholesale pattern and practice" of not providing competent interpreters during plaintiffs' LO interviews. Plaintiffs' Reply Mem. of L. at 9. Defendant argues that neither the Due Process Clause, nor the Act and its regulations, require the INS to furnish competent translators to SAW applicants; and, in any event, plaintiffs have not shown how a lack of competent interpreters prejudiced their applications. Defendant further submits that "mere common sense would suggest that it was plaintiffs who bore the burden of bringing along someone with them at their legalization interviews who would interpret for them," because aliens who wish to be nationalized must learn to [**50] read English. Defendant's Reply Mem. of L. at 19

'(emphasis in original), citing Soberal-Perez v. Heckler, 717 F.2d 36, 42 (2d Cir. 1983), cert. denied, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984).

Plaintiffs claim that interpreters who spoke the same language as they do were present at only 21 interviews.[12] In the case of plaintiff Khadim Hussain, who speaks Urdu, the interview was allegedly conducted in Spanish; another plaintiff who speaks [*1097] Punjabi was apparently provided with an interpreter who speaks Urdu. See Abdullah Compl. at ¶ 11. Defendant submits the affidavit of John Cappiello, a supervisory legalization officer for the New York District LO, who declares that, "in processing and adjudicating SAW applications, the New York District Legalization Office provided interpreters for those applicants who were determined to be not capable of speaking English. The interpreters that were provided for interviews in connection with SAW applications were competent to translate the language of the applicant being interviewed." Affidavit of John Cappiello, dated April 11, 1994. However, Cappiello does not state that he was present at plaintiffs' interviews, and, [**51] according to plaintiffs, he was present at only one such interview. Plaintiffs, on the other hand, have personal knowledge of what took place at their interviews.

The Court is guided by the principle that "the fundamental requisite of due process of law is the opportunity to be heard . . . at a meaningful time and in a meaningful manner." Goldberg v. Kelly, 397 U.S. at 267, 90 S. Ct. at 1020. Moreover, "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Id., 397 U.S. at 268-69, 90 S. Ct. at 1021.

It is well established that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time,

---

[12]Each plaintiff has submitted an affidavit stating what language he or she speaks and whether or not there was an interpreter present at the LO interview who spoke the plaintiff's language.

place and circumstances." Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976). Rather, [**52] due process is "flexible and calls for such procedural protections as the particular situation demands." Id. Therefore, in evaluating the procedures employed by the INS, we must evaluate (1) the interest at stake for the individual, (2) the risk of an erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or different procedural safeguards, and (3) the interest of the government in using the current procedures rather than additional or different procedures. Id., 424 U.S. at 335, 96 S. Ct. at 903; see also Landon v. Plasencia, 459 U.S. 21, 34, 103 S. Ct. 321, 330, 74 L. Ed. 2d 21 (1982). The Eleventh Circuit applied these factors in Haitian Refugee Center, Inc. v. Nelson, supra, and found that

> plaintiffs' interest in establishing their entitlement to adjustment under the SAW program is plain. Evidence as to the second Mathews factor is equally persuasive. Without an adequate interpreter at the interview, the risk of an erroneous recommendation is unacceptably high. The ability of the adjudicator at the interview to make a reasonable assessment of the applicant's credibility is obviously hampered by [**53] his inability to understand the applicant's statements.

Id., 872 F.2d at 1562. The Court further stated that a consideration of the third factor was unnecessary since the INS's procedures already contemplated the relief plaintiffs sought. Specifically, the Court noted that, "the INS Examinations Handbook directs the examining officer to 'make certain whether the services of an interpreter are required' if the person being questioned does not speak English." Id. Accordingly, the Eleventh Circuit affirmed the district court's order requiring the LOs to "maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages . . . if necessary." Id., 872 F.2d at 1562, n. 13.

We find the Eleventh Circuit's reasoning in Haitian Refugee Center, Inc. v. Nelson, supra, persuasive. Particularly where credibility is at issue, it is vital that an applicant be able to understand the questions posed, and equally important that the examiner understand an applicant's responses. If an applicant does not speak and understand English moderately well, the "presence of a competent interpreter is critical to the fairness of a hearing." [**54] Kotasz v. I.N.S., 31 F.3d 847, 850, n. 2 (9th Cir. 1994); see also Mentor v. I.N.S., 834 F. Supp. 133, 137 (E.D. Pa. 1993) (the right to "be able to participate meaningfully by having the proceedings translated into a language he or she understands is fundamental"); United States v. Mosquera, 816 F. Supp. 168, 172, (E.D.N.Y. 1993) ("To be 'present' implies more than being physically present. It assumes that a defendant will be informed about the proceedings so he can assist in his own defense").

[*1098] The record shows that the LO examiners often inquired as to the applicants' knowledge of farming or of the farm on which the applicant claimed to have worked. If an examiner found the response to such inquiries to be inadequate, he or she tended to conclude that the applicant was not credible, whereas the applicant may have had difficulty expressing the answer in English. See, e.g., Defendant's Ex. B at 738 ("applicant has no knowledge of farming"); id. at 487 (applicant "worked with squash-- he said the color is red but could not describe the shape") (emphasis in original) id. at 4028 ("applicant doesn't have to [sic] much knowledge of employer"); id. at 4123 [**55] ("testimony is unbelievable he couldn't tell me much about this farm"); id. at 4527 (Applicant "could not describe how one would 'short a peach' or 'shovel a tree'"); id. at 8370 ("Subject was not convincing during the interview that he actually did farm work"); id. at 8575 (Applicant was "unable to explain farm work. Did not know process of planting, harvesting and cultivation"). In some cases, the LO examiner actually noted an applicant's inability to communicate, yet an interpreter was not provided. See, e.g., id. at 145 ("Applicant's knowledge of English extremely limited. Responded to simple questions with "farm work" or "Royal Crest Meats"); id. at 3659 ("Did not believe this woman had been in

U.S. since 1985 as claimed, poor English for an Indian who's been here 3 years! . . . I asked 3 times if she came 1 time only & left & she kept saying yes").

Under the circumstances of this case, the Court finds that plaintiffs have a due process right to competent interpreters, and the INS must make such interpreters available when necessary. Defendant argues that plaintiffs have not shown how competent interpreters would have enhanced their capability to address the [**56] INS's evidence of their employers' fraud. However, where an applicant's own credibility, with regard to his documentary evidence and oral statements, is pitted against evidence of an employer's fraud, it is clear that the applicant's ability to make himself understood is essential. Where an applicant is unable to do so, due to defendant's failure to provide competent interpreters, his case has been prejudiced.

d. Do Plaintiffs Have a Due Process Right to View Adverse Evidence and Cross-Examine Adverse Witnesses?

Plaintiffs submit that they have a due process right to view adverse evidence and cross-examine adverse witnesses before a determination is made on their applications, citing Goldberg v. Kelly, 397 U.S. 254, 269-70, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"), and Greene v. McElroy, 360 U.S. 474, 496-97, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959) (same). Defendant responds that the Act does not provide for a formal hearing, nor does the SAW program involve the termination of benefits as in [**57] Goldberg v. Kelly, supra. Further, the procedures employed by the INS provide that plaintiffs be informed of the adverse evidence in the RPF's "intent to deny" letter and given an opportunity to submit additional documentary evidence to rebut it, prior to a final determination.

The Court must apply the three Mathews factors noted above, i.e., (1) the interest at stake for the individual, (2) the risk of an

erroneous deprivation of the interest through the procedures used and the probable value of additional or different procedural safeguards, and (3) the interest of the government in using the current procedures rather than additional or different procedures. See Mathews v. Eldridge, 424 U.S. at 335, 96 S. Ct. at 903.

Again, plaintiffs' interest in establishing their entitlement to adjustment under the SAW program is self-evident. However, the risk of an erroneous deprivation of plaintiffs' interest, due to the procedures in question, is less clear. Prior to the denial of a SAW application, the RPF informs the applicant of any adverse evidence which affects the application. The applicant has 30 days to submit any evidence to overcome the stated reasons for denial. [**58] So long as (1) the adverse evidence does not raise an irrebuttable presumption of fraud, see supra, (2) such evidence is properly disclosed to the applicant, [*1099] see de la Llana-Castellon v. I.N.S., 16 F.3d at 1096; Haitian Refugee Center, Inc. v. Nelson, 694 F. Supp. at 880,[13] and (3) defendant engages in a "careful, individualized review of the evidence presented in [plaintiffs'] applications and [interview]," Kaczmarczyk v. I.N.S., 933 F.2d at 595, this procedure does not pose a significant risk of error and comports with the requirements of due process. Moreover, the INS has a significant interest in maintaining a relatively simple adjudication procedure, which does not entail the delays and other difficulties inherent to the discovery process of full-blown litigation. See Landon v. Plasencia, 459 U.S. at 34, 103 S. Ct. at 330 (government has interest in efficient administration of immigration laws). Accordingly, the Court finds that plaintiffs do not have a due

---

[13]The facts in this case differed from those here in that plaintiffs were not given an opportunity to supplement their applications to support a suspect affidavit. Therefore, the Court ordered that, "in those cases in which the INS considered evidence adverse to the applicant of which the applicant was unaware . . . the INS shall vacate the denials, afford the applicant an opportunity to examine the adverse evidence, to rebut it, and to offer additional evidence before rendering a decision." 694 F. Supp. at 880 (emphasis supplied).

process right to view defendant's adverse evidence and cross-examine adverse witnesses. [**59]

e. Do Plaintiffs Have a Due Process Right to a Written Transcript or Recording

Plaintiffs claim that they have a due process right to a written transcript or recording of their LO interviews, since the interview is "the only face to face encounter between the examiner and the applicant." Plaintiffs' Mem. of L. at 15. Moreover, plaintiffs state that the interviewers' notes are "generally sketchy and conclusory, and are entirely one-sided," but it is this record that accompanies the application to the RPF, LAU and even the Circuit Court of Appeals in an exclusion or deportation proceeding. Id.

Plaintiffs cite no authority for the proposition that due process requires that a written transcript or recording be made of LO interviews, and the Court has found none.[14] Moreover, application of the three Mathews factors, supra, leads us to a determination in favor of defendant on this point. Plaintiffs have not shown that there is a risk of erroneous deprivation of their interest in obtaining SAW status due to the lack of written transcripts or recordings. As noted above, the INS has a significant interest in employing a less formal adjudication procedure than that which [**60] one finds in a courtroom among litigants. Accordingly, the Court finds that plaintiffs do not have a due process right to written transcripts or recordings of their LO interviews. [15]

---

[14]In Equan v. I.N.S., 844 F.2d 276 (5th Cir. 1988), the Fifth Circuit held that "creating a summary of testimony rather than recording a hearing does not in itself implicate the due process clause." Id., 844 F.2d at 279.

[15]Plaintiffs do not allege that defendant has prohibited them from hiring stenographers to transcribe the interviews or from making their own audio recordings of the interviews.

CONCLUSION

Defendant's motion to dismiss or for summary judgment is denied. Plaintiffs' motion for summary judgment is granted to the extent set forth herein. Defendant is ordered to vacate the denials of plaintiffs' applications for SAW status and readjudicate plaintiffs' applications in accordance with the principles set forth in this Opinion and Order. Specifically, defendant is ordered to (1) provide plaintiffs [**61] with competent interpreters, (2) consider each plaintiff's application individually, without reference to a fraud profile based on ethnicity or national origin, and (3) afford plaintiffs the opportunity to rebut adverse evidence, without raising an irrebuttable presumption of fraud based on their employers' fraud in other cases.

SO ORDERED.

_____

ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York
March 29, 1996

Service: LEXSEE«
Citation: 1996 U.S. Dist. LEXIS 3935

## APPENDIX D

## § 210. IMMIGRATION AND NATIONALITY ACT

United States, or other Iraqi national who was moved to Guam by the United States Government in 1996 or 1997 pursuant to an arrangement made by the United States Government, and who was granted asylum in the United States under section 208(a)of the Immigration and Nationality Act (8 U.S.C. 1158(a)).

### Special Agricultural Workers

Section 210, 8 U.S.C. 1160[42]

**(a) Lawful Residence**

**(1) In General**

The Attorney General shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the Attorney General determines that the alien meets the following requirements:

**(A) Application Period**

The alien must apply for such adjustment during the 18 month period beginning on the first day of the seventh month that begins after the date of enactment of this section.

---

[42]Sec. 210 added by Sec. 302, Act of Nov. 6, 1986, Pub. L. No.99 603, 100 Stat. 33 3417, and amended by Secs. 307(j} and (1} and Sec. 309(b)(6) of the Miscellaneous. Technical Immigration and Naturalization Amendments of 1991, Act. of Dec. 12, 1991, p L No. 12 232, 105 Stat !733.

**(B) Performance of Seasonal Agricultural Services and Residence in the United States**

The alien must establish that he has-

(i) resided in the United States, and

(ii) performed seasonal agricultural services in the United States for at least 90 man days,

during the 12 month period ending on May 1, 1986. For purposes of the previous sentence, performance of seasonal agricultural services in the United States for more than one employer on any one day shall be counted as performance of services for only 1 man-day.

**(C) Admissible as Immigrant**

The alien must establish that he is admissible to the United States as a immigrant. except as otherwise provided under subsection (c)(2).

**(2) Adjustment to Permanent Residence**

The Attorney General shall adjust the status of any alien provided law temporary resident status under paragraph (1) to that of an alien lawfully admitted for permanent residence on the following date:

**IMMIGRATION AND NATIONALITY ACT**

**(A) Group 1**

Subject to the numerical limitation established under subparagraph (C), in the case of an alien who has established, at the time of application for temporary residence under paragraph ( I ), that the alien performed seasonal agricultural services in the United States for at least 90 man days during each of the 12 month periods ending on May I, 1984, 1985, and 1986, the adjustment

shall occur on the first day after the end of .the one year period that begins on the later of (I) the date the alien was granted such temporary resident status, or (II) the day after the last day of the application period described in paragraph ( I )(A).

**(B) Group 2**

In the case of aliens to which subparagraph (A) does not apply, the adjustment, shall occur on the day after the last day of the two year period that begins on the later of (I) the date the alien was granted such temporary resident status, or (II) the day after the last day of the application period described in paragraph (1)(A).

**(C) Numerical Limitation**

Subparagraph (A) shall not apply to more than 350,000 aliens. If more than 350,000 aliens meet the requirements of such subparagraph, such subparagraph shall apply to the 350,000 aliens whose applications for adjustment were first filed under paragraph (I) and subparagraph (B) shall apply to the remaining aliens.

**(3) Termination of Temporary Residence**

(A) During the period of temporary resident status granted an alien under paragraph ( I ), the Attorney General may terminate such status only upon a determination under this Act that the alien is deportable.

(B)[43] Before any alien becomes eligible for adjustment of status under paragraph (2), the Attorney General may deny adjustment to permanent status and provide for termination of the

---

[43]Subpar. (8) was added by Sec. 3 of the Immigration Nursing Relief Act of 1989, Act of Dec. 18, 1989, Pub. L. No. 101-238, 103 Stat. 2099, and amended by Sec. 603(a) of Act of 1990, Act of Nov. 29, 1990, Pub. L.. No. 101-649, 104 Stat.4978.

temporary resident status granted such alien under paragraph (I) if -

(i) the Attorney General finds by a preponderance of the evidence that the adjustment to temporary resident status was the result of fraud or willful misrepresentation as set out in section 212(a)(6)(C)(i), or

(ii) the alien commits an act that (I) makes the alien inadmissible to the United States as an immigrant, except as provided under subsection (c)(2), or (II) is convicted of a felony or three or more misdemeanors committed in the United States.

**§ 210(b) IMMIGRATION AND NATIONALITY ACT**

**(4) Authorized Travel Residence and Employment During Temporary**

During the period an alien is in lawful temporary resident status granted under this subsection, the alien has the right to travel abroad (including commutation from a residence abroad) and shall be granted authorization to engage in employment in the United States and shall be provided an "employment authorized" endorsement or other appropriate work permit, in the same manner as for aliens lawfully admitted for permanent residence.

**(5) In General**

Except as otherwise provided in this subsection, an alien who acquires the status of an alien lawfully admitted for temporary residence under paragraph (I), such status not having changed, is considered to be an alien lawfully admitted for permanent residence (as described in section 1 0 1 (a)(20», other than under any provision of the immigration laws.

**(b) Applications for Adjustment of Status**

**(1) To Whom May Be Made**

**(A) Within the United States**

The Attorney General shall provide that applications for adjustment of status under subsection (a) may be filed -

(i) with the Attorney General, or

(ii) with a designated entity (designated under paragraph (2), but only if the applicant consents to the forwarding of the application to the Attorney General.

**(B) Outside the United States**

The Attorney General, in cooperation with the Secretary of State, shall provide, a procedure whereby an alien may apply for adjustment of status under subsection (a)(l) at an appropriate consular office outside the United States. If the alien otherwise qualifies for such adjustment, the Attorney General shall provide such documentation of authorization to enter the United States and to have the alien's status adjusted upon entry as may be necessary to carry out the provisions of this section

**(2) Designation of Entities to Receive Applications**

For purposes of receiving applications under this section, the Attorney General-

(A) shall designate qualified voluntary organizations and other qualified State, local, community, farm labor organizations, and associations of agricultural employers, and

(B) may designate such other persons as the Attorney General determines are qualified and have substantial experience,

demonstrated competence, and traditional long-term involvement in the preparation and submittal of applications for adjustment of status under section 209 or 245, Pub. L. No. 89-732, or Pub. L. No. 95-145.

**(3) Proof of Eligibility**

**(A) In General**

An alien may establish that he meets the requirement of subsection (a)(I)(B)(ii) through government employment records, records supplied by employers or collective bargaining organizations, and such other reliable documentation as the alien may provide. The Attorney General shall establish special procedures to credit properly work in cases in which an alien was employed under an assumed name.

**(B) Documentation of Work History**

(i) An alien applying for adjustment of status under subsection (a)(l) has the burden of proving by a preponderance of the evidence that the alien has worked the requisite number of man days (as required under subsection (a)( 1)(B)(ii)

(ii) If an employer or farm labor contractor employing such an alien has kept proper and adequate records respecting such employment, the alien's burden of proof under clause (i) may be met by securing timely production of those records under regulations to be promulgated by the Attorney General.

(iii) An alien can meet such burden of proof if the alien establishes that the alien has in fact performed the work described in subsection (a)(I)(B)(ii) by producing sufficient evidence to show the extent of that employment as a matter of just and reasonable inference. In such a case, the burden then shifts to the Attorney General to disprove the alien's evidence with a showing which negates the reasonableness of the inference to be

drawn from the evidence.

**(4) Treatment of Applications by Designated Entities**

Each designated entity must agree to forward to the Attorney General applications filed with it in accordance with paragraph (1)(A)(ii) but not to forward to the Attorney General applications filed with it unless the applicant has consented to such forwarding. No such entity may make a determination required by this section to be made by the Attorney General.

**(5) Limitation on Access to Information**

Files and records prepared for purposes of this section by designated entities operating under this section are confidential and the Attorney General and the Attorney General and the Service shall not have access to such files or records relating to an alien without the consent of the alien, except as allowed by a court order issued pursuant to (6) of this subsection.

**(6) Confidentiality of Information**

**(A) In general**

Except as provided in this paragraph, neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may -

(i)[44] use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, including a determination under subsection (a)(3)(B), or for enforcement of paragraph (7);

(ii) make any publication whereby the information furnished by any particular individual can be identified; or;

---

[44] As amended by Sec. 4 of the Immigration Nursing Relief Act of 1989, Act of Dec. 18, 1989, Pub. L. No. 101 238, 103 Stat. 2099.

(iii) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications.

**(B) Required Disclosures**

The Attorney General shall provide information furnished under this section, and any other information derived from such furnished information, to a duly recognized law enforcement entity in connection with a criminal investigation or prosecution, when such information is requested in writing by such entity, or to an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

**(C) Construction**

**(i) In General**

Nothing in this paragraph shall be construed to limit the use, or release, for immigration enforcement purposes or law enforcement purposes of information contained in files or records of the Service pertaining to an application filed under this section, other than information furnished by an applicant pursuant to the application, or any other information derived from the application, that is not available from any other source.

**(ii) Criminal Convictions;**

Information concerning whether the applicant has at any time ben convicted of a crime may be used or released for immigration enforcement or law enforcement purposes.

**(D) Crime**

Whoever knowingly uses, publishes, or permits information to be examined in violation of this paragraph shall be

fined not more than $10,000.

**§ 210(c)**

**(7) Penalties for False Statements in Applications**

**(A) Criminal Penalty**

Whoever-

(i) files an application for adjustment of status under this section and knowingly and willfully falsifies, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, or

(ii) creates or supplies a false writing or document for use in making such an application, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

**(B) Exclusion**

An alien who is convicted of a crime under subparagraph (A) shall be considered to be inadmissible to the United States on the ground described in section 212( a)(6)(C)(i).

**(c) Waiver of Numerical Limitations and Certain Grounds for Exclusion**

**(1) Numerical Limitations Do No Apply**

**The numerical limitations of sections 201 and 202 shall not apply to the adjustment of aliens to lawful permanent resident status under this section.**

**(2)[45] Waiver of Grounds for Exclusion**

**In the determination of an alien's admissibility under subsection (a)(I)(C)-**

**(A) Grounds of Exclusion Not Applicable**
**The provisions of paragraphs (5) and (7)(A) of section 212(a) shall not apply.**

**(B) Waiver of Other Grounds**

**(i) In General**

**Except as provided in clause (ii), the Attorney General may waive any other section 212(a) in the case of individual aliens for humanitarian assure family unity, or when it is otherwise in the public interest.**

**(ii) Grounds That May Not Be Waived**

**The following provisions of section 212(a) may not be waived by the Attorney General under clause (i)**
**§ 210(d)**

**(I) Paragraphs (2)(A) and (2)(B) (relating to criminals).**

**(II) Paragraph (4) (relating to aliens likely to become public charges).**

**(III) Paragraph (2)(C) (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marihuana.**

**(IV) Paragraph (3) (relating to security and related**

---

[45]As amended by Sec. 603(a} of the Immigration Act of I990, Act of Nov. 29, 1990,L. No. 101 649, 104 Stat. 4978.

**grounds), other than subparagraph (E) thereof.**

**(C) Special Rule for Determination of Public Charge**

**An alien is not ineligible for adjustment of status under this section due to being inadmissible under section 212(a)(4) if the alien demonstrates a history of employment in the United States evidencing self-support without reliance on public cash assistance.**

**(d) Temporary Stay of Exclusion or Deportation and Work Authorization for Certain Applicants**

**(1) Before Application Period**

The Attorney General shall provide that in the case of an alien who apprehended before the beginning of the application period described in subsection (a)(l) and who can establish a nonfrivolous case of eligibility to have his status adjusted under subsection (a) (but for the fact that he may not apply for such adjustment until the beginning of such period), until the alien has had the opportunity during the first thirty days of the application period to complete the filing of an application for adjustment, the alien-

(A) may not be excluded or deported, and

(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.

**(2) During Application Period**

**The Attorney General shall provide that in the case of an alien who presents a nonfrivolous application for adjustment of status under subsection (a) during the application period, and until a final determination on the**

**application has been made in accordance with this section, the alien -**

**(A) may not be excluded or deported, and**

**(B) shall be granted authorization to engage in employment in the United States and be provided an "employment authorized" endorsement or other appropriate work permit.**

(3)[46] Use of Application Fees to Offset Program Costs

No application fees collected by the Service pursuant to this subsection may be used by the Service to offset the costs of the special agricultural worker legalization program until the Service implements the program consistent with the statutory mandate as follows:

(A) During the application period described in subsection (a)(I)(A) the Service may grant temporary admission to the United States, work authorization, and provide an "employment authorized" endorsement or other appropriate work permit to any alien who presents a preliminary application for adjustment of status under subsection (a) at a designated port of entry on the southern land border. An alien who does not enter through a port of entry is subject to deportation and removal as otherwise provided in this Act.

(B) During the application period described in subsection (a)(I)(A) any alien who has filed an application for adjustment of status within the United States as provided in subsection (b )(1)(A) pursuant to the provision of 8 CFR section 210.1(j) is subject to paragraph (2) of this subsection.

(C) A preliminary application is defined as a fully

---

[46]Subpar. (3) added by Sec. 2\ \. Act of Dec. 22. 1987, Pub. L. No. 100 22, 10

completed and signed application with fee and photographs which contains specific information concerning the performance of qualifying employment in the United States and the documentary evidence which the applicant intends to submit as proof of such employment. The applicant must be otherwise admissible to the United States and must establish to the satisfaction of the examining officer during an interview that his or her claim to eligibility for special agriculture worker status is credible.

**(e) Administrative and Judicial Review**

**(1) Administrative and Judicial Review**

There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section accept in accordance with this subsection.

**(2) Administrative Review**

**(A) Single Level of Administrative Appellate Review**

The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of such a determination.

**(B) Standard for Review**

Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

**§ 210(f)**

**(3) Judicial Review**

**(A) Limitation to Review of Exclusion or Deportation**

There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 106 (as in effect before 1, 1996).

**(B) Standard for Judicial Review**

Such judicial review shall be based solely upon the established at the time of the review by the appellate authority and the of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly to clear and convincing facts contained in the record considered as a whole

**(F) Temporary Disqualification of Newly Legalized liens From Receiving Aid to Families With Dependent Children**

During the five-year period beginning on the date an alien was granted lawful temporary resident status under subsection (a), and notwithstanding any other provision of law, the alien is not eligible for aid under a State plan approved under part A of title IV of the Social Security Act: Notwithstanding the previous sentence, the provisions of paragraph (3) of section 245A(h) shall apply in the same manner as they apply with respect to paragraph (I) is deemed a reference to the previous sentence.

**(g)[47] Treatment of Special Agricultural Workers**

For all purposes (subject to subsections (a)(5) and (f) and alien whose status is adjusted under this section to that of an alien lawfully admitted for permanent residence, such status not having

---

[47]As amended by section 2(m), Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609.

changed, shall be considered to be an alien lawfully admitted for permanent residence (within the meaning of 101(a)(20).

**(h) Seasonal Agricultural Services Defined**

In this section, the term "seasonal agricultural services" means the performance of field work related to planting, cultural practices, cultivating, growing and harvesting of fruits and vegetables of every kind and other perishable commodities, as defined in regulations by the Secretary of Agriculture.

Section 210A, 8 U.S.C. 1161 [Repeated]

[Section 210A, which related to Determination of Agricultural Labor Shortages of Additional Special Agricultural Workers, was repealed by Sec. 219(ee)(1)of the Immigration and Nationality Technical Corrections Act of 1994 (Pub. L. No.103-416, 108 Stat. 4319 (Oct. 25, 1994) )). It would appear that this amendment was effective as of November 29, 1990 ( i.e., as if included in the enactment of the Immigration Act of 1990), under Sec. 219(dd) of Pub. L. 103-416.]

## Chapter 2
## Qualifications for Admission of Aliens: Travel Control of Citizens and Aliens

### Documentary Requirements

**211, 8 U.S.C. 1181[1]**

**(a) Documents Required; Admission Under Quotas Before June 30, 1968**

Except as provided in subsection (b) and subsection (c) no immigrant shall be admitted into the United States unless at the time of application for admission he

(1) has a valid unexpired immigrant visa or was born subsequent to the issuance of such visa of the accompanying parent, and

(2) presents a valid unexpired passport or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General.

With respect to immigrants to be admitted under quotas of quota areas prior to June 30, 1968, no immigrant visa shall be deemed valid unless the immigrant is properly chargeable to the quota area under the quota of which the visa is issued.[2]

---

[1]As amended by Act of Oct. 3, 1965, 79 Stat. 916 and by Sec. 202, Refugee Act of 1980, enacted March 17, 1980, Pub. L. No. 96-212, 94 Stat. 106.

[2]Reference to subsection (c) inserted in text preceding par. (1) by Sec. 202(1), RefugeeAct of 1980, Act of March 17, 1980, Pub.L. No. 96-212, 94 Stat. 106.

**(b) Readmission Without Required Documents; Attorney General's Discretion**[3]

Notwithstanding the provisions of section 2I2(a)(7)(A) in such cases or in such classes of cases and under such conditions as may be by regulations prescribed,

---

[3]As amended by Sec. 7(c), Act of Oct. 20, 1976, Pub. L. No. 94-571, 90 Stat. 2706 and by Sec. 603(a) of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978.

## APPENDIX E

### § 210.2 Application for temporary resident status.

**[ 8 C.F.R. § 210.2(a)]**

*(a) (1) Application for temporary resident status.* An alien agricultural worker who believes that he or she is eligible for adjustment of status under the provisions of § 210.3 of this part may file an application for such adjustment at a qualified designated entity, at a legalization office, or at an overseas processing office out side the United States. Such application must be filed within the application period.

**[ 8 C.F.R. § 210.2(c)(2)]**

(2) *Applications in the United States.* (i) The application must be filed on Form I- 700 with the required fee and, if the applicant is 14 years or older, the application must be accompanied by a completed Form FD-258 (Fingerprint card).

(ii) All fees for applications filed in the United States, other than those within the provisions of § 210.2(c)(4), must be submitted in the exact amount in the form of a money order, cashier's check, or bank check made payable to the Immigration and Naturalization Service. No personal checks or currency will be accepted. Fees will not be waived or refunded under any circumstances.

(iii) In the case of an application filed at a legalization office, including an application received from a qualified designated entity, the district director may, at his or her discretion, require filing either by mail or in person, or may permit filing in either manner.

(iv) Each applicant, regardless of age, must appear at the appropriate Service legalization office and must be fingerprinted for the purpose of issuance of Form 1-688A. Each applicant shall be interviewed by an immigration officer, except that the interview may be waived when it is impractical because of the

health of the applicant.

**[ 8 C.F.R. § 210.4(b)(2)]**

(2) Employment and travel authorization prior to the granting of temporary resident status. Permission to travel abroad and to accept employment will be granted to the applicant after an interview has been conducted in connection with a nonfrivolous application at a Service office. If an interview appointment cannot be scheduled within 30 days from the date an application is filed at a Service office, authorization to accept employment will be granted, valid until the scheduled appointment date. Employment authorization, both and subsequent to an interview, will be restricted to increments not exceeding not exceeding 1 year, pending final determination on the application for temporary resident status. If a final determination has not been made prior to the expiration date on the Employment Authorization Document (Form I-766, Form I-688A or Form I-688B) that date may be extended upon return of the employment authorization document by the applicant to the appropriate Service office. Persons submitting applications who currently have work authorization incident to status as defined in § 274a.12(b) of this chapter shall be granted work authorization by the Service effective on the date the alien's prior work authorization expires. Permission to travel abroad shall be granted in accordance with the Service's advance parole provision contained in §212.5(e) of this chapter.

## APPENDIX F

**FROM**

**US DEPARTMENT OF JUSTICE**
**US IMMIGRATION AND NATURALIZATION**
**ASYLUM OFFICE**
**1200 WALL ST WEST**
**LYNDHURST, NJ 07071**

NAME: DATE: 10/15/97

A-NUMBER ***INTERVIEW NOTICE*** FORM I-589

You and your family members on your Form I-589 are scheduled for interview as shown below. Bring a written form of identification; name, date and place of birth, and nationality; 3 copies of evidence of your relationship to family members on your I-589 (marriage or birth certificates, or affidavits); and other evidence not submitted before. If you cannot speak English fluently, you must provide a competent interpreter at least 18 years old who is not your attorney representative, or witness. Failure without good cause to appear for interview or to provide competent interpreter may result in immediate referral to an immigration judge.

INTERVIEW DATE: 11/05/97
Time: 9:00

AT
INS ASYLUM OFFICE
1200 WALL ST WEST
FOURTH FLOOR
LYNDHURST, NJ 07071

**TO**

- - -
- - -
- - -

Supreme Court, U.S.
FILED
MAR 13 2000
CLERK

No. 99-1162

# In the Supreme Court of the United States

SYED ABDULLAH, ET AL., PETITIONERS

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
DAVID W. OGDEN
*Acting Assistant Attorney General*
DONALD E. KEENER
LINDA S. WENDTLAND
GRETCHEN M. WOLFINGER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

19 pp

## QUESTION PRESENTED

Whether aliens applying for lawful temporary residence under the special agricultural worker legalization provisions of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1160 (1994 & Supp. IV 1998), were entitled under the Due Process Clause of the Fifth Amendment to interpreters at government expense when they were interviewed by Immigration and Naturalization Service legalization officers concerning their legalization applications.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 15 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40 (1999) | 10, 11 |
| *Campos* v. *INS*, 402 F.2d 758 (9th Cir. 1968) | 10 |
| *Castano* v. *INS*, 956 F.2d 236 (11th Cir. 1992) | 10 |
| *Choe* v. *INS*, 11 F.3d 925 (9th Cir. 1993) | 10 |
| *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) | 8 |
| *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967) | 6-7 |
| *Haitian Refugee Ctr., Inc.* v. *Nelson*, 694 F. Supp. 864 (S.D. Fla. 1988), aff'd, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991) | 7, 8, 9, 11, 12, 14 |
| *Landon* v. *Plasencia*, 459 U.S. 21 (1982) | 4, 12, 13 |
| *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) | 4, 7, 10, 11, 12, 13 |
| *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) | 9, 11, 13 |
| *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714 (1981) | 9 |
| *Rahim* v. *McNary*, 24 F.3d 440 (2d Cir. 1994) | 14 |
| *University of Tex.* v. *Camenisch*, 451 U.S. 390 (1981) | 8 |

| Constitution, statutes and regulations: | Page |
|---|---|
| U.S. Const. Amend. XIV | 10 |
| Immigration Reform and Control Act of 1986: | |
| 8 U.S.C. 1160 (1994 & Supp. IV 1998) | 2, 11 |
| 8 U.S.C. 1160(a)(1)(A) | 2 |
| 8 U.S.C. 1160(a)(1)(B) | 2 |
| 8 U.S.C. 1160(a)(1)(C) | 2 |
| 8 U.S.C. 1160(a)(2) | 2, 13 |
| 8 U.S.C. 1160(b)(2) | 13 |
| 8 U.S.C. 1160(b)(3) | 14 |
| 8 U.S.C. 1160(b)(4) | 13 |
| 8 U.S.C. 1160(b)(6)(A) (1994 & Supp. IV 1998) | 11 |
| 8 U.S.C. 1160(e)(2)(B) | 14 |
| 8 U.S.C. 1423(a)(1) | 13 |
| 8 C.F.R.: | |
| Section 103.2(b)(16)(i) | 14 |

# In the Supreme Court of the United States

No. 99-1162

SYED ABDULLAH, ET AL., PETITIONERS

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 184 F.3d 158. The opinion of the district court (Pet. App. A19-A56) is reported at 921 F. Supp. 1080.

### JURISDICTION

The judgment of the court of appeals was entered on July 8, 1999. A petition for rehearing was denied on October 12, 1999 (Pet. App. A18). The petition for a writ of certiorari was filed on January 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners are aliens unlawfully present in the United States who unsuccessfully applied for lawful temporary resident status under the legalization program for special agricultural workers (SAWs) established by Congress in the Immigration Reform and Control Act of 1986 (IRCA). See 8 U.S.C. 1160 (1994 & Supp. IV 1998). Under the SAW program, an alien was eligible for lawful temporary resident status if the alien established that he was admissible as an immigrant, and that he had resided in the United States and performed seasonal agricultural services in the United States for at least 90 man-days during the 12-month period ending on May 1, 1986. 8 U.S.C. 1160(a)(1)(B) and (C). An alien provided lawful temporary resident status could eventually be granted lawful permanent resident status, subject to certain numerical and timing restrictions. 8 U.S.C. 1160(a)(2).

Under Immigration and Naturalization Service (INS) regulations, the SAW application process was commenced by the filing of an application for lawful temporary resident status by the alien. Applications for legalization under the SAW program were required to be made between June 1, 1987, and November 30, 1988. See 8 U.S.C. 1160(a)(1)(A); 8 C.F.R. 210.2; Pet. App. A3. Aliens who applied for legalization in the United States were required to be interviewed at an INS office by an INS legalization officer (LO). 8 C.F.R. 210.2(c)(2)(iv). Based on a review of the alien's application, including the interview, the LO would then recommend approval or denial of the application to the INS Regional Processing Facility (RPF). If the LO recommended denial and the RPF concurred, the RPF would issue a notice of intent to deny the application. The notice of

intent to deny informed the applicant of the grounds supporting the denial and of the applicant's right to submit rebuttal evidence. The RPF would then consider any additional evidence that might be brought to its attention by the applicant and render a decision on the application. An RPF denial of a SAW legalization application could be appealed to the INS Legalization Appeals Unit (LAU). The applicant was permitted to submit any newly discovered evidence not available at the time of the RPF's decision to the LAU. The LAU then rendered a decision on the appeal. See Pet. App. A4-A5.

2. Petitioners are aliens, mostly from the Indian subcontinent, whose applications for legalization under the SAW program were denied by the LAU. Petitioners filed suit in the United States District Court for the Southern District of New York, alleging that practices followed by the INS LOs in processing their SAW applications violated federal law and the Constitution. Pet. App. A5. In particular, petitioners contended that the INS applied an improper irrebuttable presumption of fraud to some of their applications based on claimed employment for particular employers who had been convicted of fraud by supplying false immigration documents in other instances (*id.* at A31-A32); that the INS improperly denied some of their applications based on a "fraud profile" generalization that aliens from Indian and Pakistani communities had engaged in widespread immigration fraud (*id.* at A42-A43); and that the INS violated due process by not providing competent interpreters at government expense during the LO interviews to those applicants without an adequate command of the English language (*id.* at A49-A50). The district court granted summary judgment for petitioners on all three claims. *Id.* at A31-A53. As

pertinent here, the district court held that the INS violated due process by failing to provide competent interpreters at the personal interviews conducted by the LOs. *Id.* at A49-A53.[1]

3. The court of appeals vacated the order granting summary judgment, reversed in part, and remanded the case in part for further proceedings. Pet. App. A1-A17. Regarding petitioners' claim that due process was violated by the INS's failure to provide interpreters during the LO interviews, the court of appeals reversed the district court and directed that summary judgment be entered in favor of the INS. *Id.* at A14.

Applying the balancing test for procedural due process claims set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976),[2] the court held that, in the context of a legalization application—in which individuals are not

---

[1] In addition to arguing that applicants for SAW benefits have no due process right to language interpretation at government expense, the INS had submitted an affidavit to the effect that the New York District Legalization Office did in fact provide competent interpreters to applicants who were determined to be not capable of speaking English. The district court disregarded that affidavit, however, on the ground that the affiant, an INS supervisory LO, did not state that he was personally present at the petitioners' legalization interviews, whereas petitioners had personal knowledge of what took place at their own interviews. Pet. App. A50.

[2] The court of appeals assumed, without deciding, that petitioners were entitled to due process in the adjudication of their legalization applications, Pet. App. A10, but it also observed that petitioners "face the government in a posture more similar to that of immigrants requesting admission at the border than that of aliens defending the legality of their presence in the country at a deportation hearing." *Ibid.* (also citing *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (for the proposition that due process "protects the latter and not the former")).

faced with the necessity of defending against adverse governmental action, like criminal prosecution or deportation, but are affirmatively petitioning the government for a status enhancement and bear the burden of establishing the validity of that status—"it is reasonable to require petitioners to make suitable arrangements for the provision of the proof necessary to meet their burdens." Pet. App. A11. The individual's interest in being furnished with an interpreter, the court stated, is much diminished in the situation where the individual "affirmatively initiates a proceeding seeking the benefits of a generous statutory exemption." *Id.* at A12 (internal quotation marks omitted). Further, the court concluded that the expense and difficulty to the government of supplying interpreters would be considerable, and that the INS had a significant interest in avoiding those burdens, given that the INS received more than 1.3 million applications for legalization under the SAW program. *Id.* at A12-A13. The court observed that "[u]pholding the right [petitioners] claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great." *Id.* at A13.

The court of appeals also vacated the district court's order granting summary judgment to petitioners on their two other claims, and remanded for further proceedings on those claims. With respect to petitioners' claim that LOs had relied improperly on a "nationality-based profile" to make findings of fraud and deny applications, the court stated that, "while the INS would be constitutionally forbidden to assume that persons of one nationality are more inclined than others to fraud," the INS "would not be barred from observing repeated indicia of similar fraud from persons of one

community, and consequently from looking more carefully at applications from others of the same community bearing similar indicia of fraud." Pet. App. A15. The court found the evidence insufficient to permit a determination on summary judgment whether the INS was relying on a pure nationality-based profile, and remanded for a trial on that issue. *Id.* at A16. On petitioners' claim that the INS had relied on an irrebuttable presumption that all applications claiming agricultural employment with certain employers were fraudulent, the court found the record inadequate to justify the conclusion that the INS had relied on such a conclusive presumption, as opposed to a "reasonable inference" of fraud in the case of employers convicted "of precisely the type of fraud in question." *Ibid.* Moreover, the court observed, even if the INS had relied on such a conclusive presumption in some cases, that would not necessarily warrant vacating its determinations in all cases involving such employers, and the district court should not have ordered the INS on that basis to readjudicate the applications of all petitioners. *Id.* at A16-A17. The court therefore remanded that claim as well for trial. *Id.* at A17.

## ARGUMENT

Petitioners renew their contention that due process requires the INS to provide, at government expense, an interpreter at the legalization officer's personal interview of an applicant for lawful temporary resident status under the Special Agricultural Worker program. That contention does not warrant this Court's review.

1. Review of petitioners' contentions is not warranted at this time because the decision of the court of appeals is interlocutory. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327,

328 (1967). Although the court rejected on the merits petitioners' due process claim based on the INS's failure to provide interpreters, the court did not reverse outright the district court's ruling in favor of petitioners on their two other claims, but rather remanded for a trial on those claims. Depending on how the district court resolves those claims at trial, either petitioners or the government may appeal again to the court of appeals, which would then issue a final judgment disposing of all of petitioners' claims. If the decision of the court of appeals at that time is adverse to petitioners, petitioners may then file another certiorari petition raising any claims they may have, including the due process claim based on the lack of interpreters.

2. Petitioners contend (Pet. 5-11) that the decision below conflicts with *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991) (*HRC*). Specifically, petitioners state that, "[w]hile the Eleventh Circuit did not consider whether the failure to provide competent interpreters was a due process violation under the standards set forth in *Mathews* v. *Eldridge*, [424 U.S. 319 (1976)] (because the INS's 'Examination Handbook' had already directed the interviewer to 'make certain whether the services of an interpreter [were] required' if the person being questioned did not speak English)," the Eleventh Circuit observed that the LO could not make a valid recommendation or set forth an accurate factual basis for his decision if he could not understand what the interviewee was trying to communicate. See Pet. 6 (quoting *HRC*, 872 F.2d at 1562). Petitioners' assertion of a circuit conflict with *HRC* is mistaken.

As petitioners recognize, the Eleventh Circuit's decision in *HRC* arose in the markedly different context of

an appeal from a grant of a preliminary injunction. See 872 F.2d at 1557, 1563. The court of appeals emphasized that "[a]ppellate review of the district court's decision [to grant a preliminary injunction] is very narrow," and it therefore applied a "clear abuse of discretion" standard of review, *id.* at 1561. Moreover, applying the well-settled preliminary injunction standard, the court considered only whether the plaintiffs had a "substantial likelihood" of success on the merits, *ibid.*, and not whether plaintiffs had actually established a meritorious case. And with the case in that posture, the Eleventh Circuit ultimately sustained the provisions of the preliminary injunction concerning interpreters without considering the third *Mathews* factor, on the ground that the INS Manual already provided for interpreters. See *id.* at 1562.

The decision of the court of appeals in this case, by contrast, decided the merits of the due process claim *de novo* and did evaluate the third *Mathews* factor. See Pet. App. A10-A14. Because the decision below and *HRC* addressed the issue of interpreters under different standards and on a different rationale, the two decisions do not present a circuit conflict warranting this Court's review—especially at the interlocutory stage of this case. See *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 316 (1999) (quoting *University of Tex.* v. *Camenisch*, 451 U.S. 390, 393 (1981) ("The two issues are significantly different, since whether the preliminary injunction should have issued depended on the balance of factors * * * while whether the University should ultimately bear the cost of the interpreter depends on a final resolution of the merits of Camenisch's case.")); *Camenisch*, 451 U.S. at 394 (observing that "likelihood of success" is not

properly equated with "success"); see also *New York State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 716 (1981).

3. Petitioners also argue (Pet. 11-12) that the decision below conflicts with *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991), where this Court affirmed that part of the Eleventh Circuit's decision in *HRC* upholding the district court's exercise of subject matter jurisdiction. Petitioners rely on this Court's "repeat-[ing of] the finding of the district court" that the INS failed to provide competent interpreters. Pet. 12. Petitioners also note that this Court observed "that the INS was not seeking review of the district court's ruling on the merits of this issue," and that there was no "dispute that the INS 'routinely and persistently violated the Constitution and statutes in processing SAW applications.'" *Ibid.* (quoting *McNary*, 498 U.S. at 491).

As petitioners acknowledge, however, this Court in *McNary* "was presented with one question for review: Whether the SAW statute 'precludes a federal district court from exercising general federal-question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the * * * INS * * * in the administration of the SAW program.'" Pet. 11 (quoting *McNary*, 498 U.S. at 483); see also 498 U.S. at 490 ("Our grant of certiorari is therefore limited to the jurisdictional question."). This Court's actual decision in *McNary* was therefore limited to the question of subject matter jurisdiction. The Court's observation that there was no "dispute that the INS routinely and persistently violated the Constitution and statutes in processing SAW applications," *id.* at 491, merely described the INS's decision not to seek review of the district court's holding on the merits in that particular case at that interlocutory stage of the case.

That the Court prefaced its observation with the language "at this stage of the litigation," *ibid.*, confirms that point. The portion of the Court's decision describing the merits of the claims is not part of *McNary*'s holding, nor was it necessary to the Court's decision.

4. The court of appeals correctly ruled that due process did not require the INS to furnish interpreters at LOs' interviews of SAW applicants. The court of appeals properly applied the three-factor test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), to evaluate the constitutional sufficiency of procedures afforded applicants for lawful temporary residence under the SAW legalization program.

Concerning the first *Mathews* factor, "the private interest that will be affected by the official action," 424 U.S. at 335, the court of appeals correctly observed that SAW applicants for legalization "have affirmatively petitioned the government for a status enhancement, whose validity it is their burden to establish." Pet. App. A11; compare *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60-61 (1999) (an employee has no property interest protected by the Due Process Clause in state workers' compensation medical benefits he is not already receiving, until the employee establishes that particular medical treatment at issue satisfies the statutory standard of being reasonable and necessary).[3] SAW applicants are therefore not like individuals who are already receiving a benefit that the government is seeking to terminate, as in *Mathews* v. *Eldridge*, or who

[3] Thus, as the court of appeals observed (Pet. App. A11), applicants for adjustment of status, such as petitioners, are similar to aliens who are seeking admission into the United States for the first time. See *Choe* v. *INS*, 11 F.3d 925, 928 (9th Cir. 1993); *Castano* v. *INS*, 956 F.2d 236, 237 n.1 (11th Cir. 1992); *Campos* v. *INS*, 402 F.2d 758, 760 (9th Cir. 1968).

are subject to government-initiated enforcement proceedings seeking to affect adversely a person's status, such as criminal prosecution or removal hearings. Pet. App. A11.[4] Unlike, for example, lawful permanent resident aliens who are placed in removal proceedings, petitioners do not, if their bid for legalization is unsuccessful, thereby stand to lose any right to stay in this country—especially given the statutory confidentiality provisions in 8 U.S.C. 1160(b)(6)(A) (1994 & Supp. IV 1998), which generally preclude the INS from using information furnished by a SAW applicant for any purpose other than adjudication of the application. The court of appeals therefore correctly concluded that "it is reasonable to require petitioners to make suitable arrangements for the provision of the proof necessary to meet their burdens." Pet. App. A11.[5]

---

[4] The Eleventh Circuit's decision in *HRC*, which concluded that aliens who were applying for (but had not yet been found eligible for) SAW status had a property interest in that status, see 872 F.2d at 1562, was rendered before this Court's decision in *American Manufacturers Mutual Insurance Co., supra.*

[5] Petitioners argue that, while they may have affirmatively petitioned the government for a status enhancement, they were encouraged to do so by Congress, which directed the Attorney General "to enlist the assistance of a variety of nonfederal organizations to encourage aliens to apply and to provide them with counsel and assistance during the application process." Pet. 8 (quoting *McNary*, 498 U.S. at 484). Nonetheless, it remains true that petitioners, in applying for legalization, are seeking a benefit under the generous provisions of IRCA, and are not faced with the government's imposition of a sanction, as in a criminal trial or a removal proceeding. For a similar reason, petitioners err in arguing that, even if SAW applicants are properly made responsible for securing interpreters for their interviews, the INS should be required at least to afford them notice of that fact, as it provides advance notice in cases involving interviews of asylum applicants. Pet. 9. Unsuccessful asylum applicants, unlike unsuccessful SAW

The court of appeals also correctly concluded that the third *Mathews* factor, the government's interest in avoiding the fiscal and administrative burdens associated with additional procedures (see 424 U.S. at 335), weighs heavily in favor of the government in this case. Pet. App. A12-A13. As the court observed, given that the INS received more than 1.3 million legalization applications under the SAW program, "[u]pholding the right [petitioners] claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great." *Ibid.*[6]

That conclusion also comports with this Court's observation that "[t]he Government's interest in efficient administration of the immigration laws at the border * * * is weighty," and that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and Legislature." *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). Furthermore, a judicially imposed requirement of interpreters at gov-

---

applicants, are subject to immediate referral by the INS for commencement of proceedings to remove them from the United States after their application is denied. See 8 C.F.R. 208.14(a) and (b)(2) (asylum application is decided either by immigration judge in removal proceedings or by asylum officer who, if he does not grant asylum and the alien appears to be removable, refers application to immigration judge for adjudication in removal proceedings).

[6] The district court, like the Eleventh Circuit in *HRC*, found it unnecessary to consider the third *Mathews* factor, because INS procedures at the time contemplated the furnishing of interpreters where they were required. See Pet. App. A51. The court of appeals in this case correctly rejected that approach, noting that "the government's prior voluntary assumption of the burden [of providing interpreters] does not render the burden nonexistent. Rule or no rule, the burden remains." *Id.* at A13.

ernment expense would impermissibly "displace congressional choices of policy." *Id.* at 35. Congress did not by statute require the INS to hire, train, and provide translators for legalization interviews; rather Congress's evident assumptions were that applicants would prove their case principally with documentary evidence, and that aliens who had worked on farms in this country either were capable of speaking sufficient English or could find a bilingual person to accompany them to an INS interview. Indeed, Congress specifically "directed the Attorney General to enlist a variety of nonfederal organizations," called qualified designated entities (QDEs), "to encourage aliens to apply and to provide them with counsel and assistance during the application process." See *McNary*, 498 U.S. at 484; 8 U.S.C. 1160(b)(2) and (b)(4). Congress's expectation that aliens applying for legalization would speak, or find assistance to speak, in English was reasonable, considering that temporary lawful resident status made available under the legalization program may be the first step towards United States citizenship. See 8 U.S.C. 1160(a)(2) (alien granted temporary resident status under SAW program may obtain permanent resident status without need for separate application); 8 U.S.C. 1423(a)(1) (aliens without understanding of English language ineligible for naturalization).

Concerning the second *Mathews* factor, the risk of error in the absence of the additional procedural safeguards (see 424 U.S. at 335), it is pertinent to observe that any failure by the INS to afford certain of the petitioners with competent interpreters—an allegation that the government in any event disputed below (see

p.4 n.1, *supra*)[7]—did not preclude petitioners from presenting their cases at their SAW application interviews. Nothing prevented petitioners from bringing their own interpreters to those interviews, a responsibility the court of appeals found "reasonable" to impose. Pet. App. A11. In addition, Congress expected SAW legalization applicants to establish their eligibility through documentary evidence, see 8 U.S.C. 1160(b)(3), and INS regulations required rejection of an applicant's personal testimony uncorroborated by credible evidence, see 8 C.F.R. 210.3(b)(3).

Furthermore, even after the conclusion of their interviews with the LOs, petitioners were afforded ample opportunity to rebut adverse evidence—in response to the RPF's notices of intent to deny their applications, and on appeal from the RPF to the LAU (Pet. App. A4-A5)—with any documentary evidence they wished to provide, including affidavits, which "[t]he INS considers * * * no different than * * * testimony." *Haitian Refugee Ctr., Inc.* v. *Nelson*, 694 F. Supp. 864, 868 n.6 (S.D. Fla. 1988), aff'd, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991); see also *Rahim* v. *McNary*, 24 F.3d 440, 441-442 (2d Cir. 1994) (permitting applicant to submit affidavits in response to RPF's notice of intent to deny application); 8 U.S.C. 1160(e)(2)(B) (permitting applicant to include new evidence as part of appeal to LAU); 8 C.F.R. 103.2(b)(16)(i) (mandating opportunity for applicant to rebut derogatory information of which applicant was unaware); 8 C.F.R. 103.3(a)(3)(i) (same).

In this case, the INS's denials of petitioners' applications were based in large part on the INS's reason-

---

[7] Petitioners appear to concede that interpreters were made available in a number of cases. See Pet. 2-3.

able inferences that petitioners' applications were supported by fraudulent documents. See Pet. App. A16. Given the absence of credible corroborative evidence, it is unlikely that petitioners' oral testimony would have materially changed the INS's decisions on their applications. Hence, petitioners have not shown that their opportunity to apply for SAW status was hindered by any lack of competent interpreters.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*
DAVID W. OGDEN
*Acting Assistant Attorney General*
DONALD E. KEENER
LINDA S. WENDTLAND
GRETCHEN M. WOLFINGER
*Attorneys*

MARCH 2000

Supreme Court, U.S.
FILED
MAR 24 2000
CLERK

(3)

No. 99-1162

**In The**

# Supreme Court of the United States

**October Term, 1999**

SYED ABDULLAH, et al

*Petitioners,*

v.

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

## PETITIONERS' REPLY BRIEF

**LINDA KENEPASKE**
*Counsel of Record*
*Attorney for Petitioners*
275 Madison Avenue
New York, New York 10016
(212) 986-5993

*Of Counsel:*
**Robert A. Murtha, Jr.**
**Helene Chowes**

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

6 PP

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i
PETITIONERS' REPLY BRIEF ..... 1
CONCLUSION ..... 4

## PETITIONERS' REPLY BRIEF

Petitioners Syed Abdullah, et al., respectfully submit this reply to the respondent's brief in opposition.

The government urges that review of the petitioners' claim that competent interpreters were required to be provided at their legalization office interviews (the "interpreter claim") is not warranted at this time because the court of appeals decision is interlocutory. Resp. 6, 7. In support of its contention, the government relies on this honorable Court's decision in Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328 (1967) ("Bangor"). Resp. 6, 7.

That case is inapposite. In Bangor, the court of appeals for the District of Columbia remanded the case for further proceedings. The court of appeals did not, as here, vacate and reverse the decision of the district court, and grant summary judgment in favor of the opposing side. Similarly, in Virginia Military Inst. v. United States, 508 U.S. 946, 947 (1993), this honorable Court, reiterating the Bangor decision, denied the petition for certiorari because the court of appeals for the Fourth Circuit had remanded the case "for determination of an appropriate remedy." Id. at 946.

Here, the interpreter claim is ripe for review by this honorable Court for a number of reasons. First, while the interpreter claim is related to the pending claims in that all three claims arose out of the same or similar facts, it also stands on its own as a separate and discrete Constitutional challenge to the government's administration of the SAW statute. Because the court of appeals ruling was final as to the interpreter claim, it is eliminated from the litigation as if it had been adjudicated and disposed of on the merits, leaving nothing more for either the district court or the court of appeals to consider. See Catlin v. United States, 324 U.S. 229, 233 (1945) (a final decision is one which terminates the litigation on the merits and leaves nothing for the court to do but execute the judgment). Therefore, the court of appeals decision on the interpreter claim does not qualify as interlocutory. Even if the court of appeals decision were deemed interlocutory, this honorable Court has discretion to review decisions by a court of appeals before or after a court of appeals has rendered judgment, where a conflict exists between or among

circuits or where a decision is not in keeping with a relevant decision of this honorable Court. Moore's Federal Practice, Secs. 403.02[1], 403.03[2][b] (3d ed. 1999).

It would not, as the government urges, make better sense for this honorable Court to postpone consideration until petitioners' other two claims are litigated in the district court, appealed by one side or the other, and then disposed of in the court of appeals, when "petitioners may then file another certiorari petition." Resp. 7. What either side might or might not do at the end of the district court litigation, or following potential court of appeals litigation, is purely speculative. On the other hand, what a postponement of consideration could result in is the possibility of a second substantial litigation if, for example, this honorable Court reverses the court of appeals decision on the interpreter claim and remands it for further proceedings, long after the other two claims have been disposed of.

As the matter stands now, the district court has marked the case off calendar pending this honorable Court's decision on the petition for certiorari. The government has not yet answered the complaint as to the two remaining issues. No formal discovery has been conducted. There are several hundred petitioners involved. If the interpreter claim were reinstated at some future date, then the litigation as to that one issue would revert to the same posture as the remainder of the case is in now. Efficiency and manageability would dictate that all of the viable issues should be litigated in the same proceeding.

The government further argues that there is no conflict between the Eleventh Circuit's decision in Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1989), aff'd on other grounds, 498 U.S. 479 (1991) ("Nelson") because the Nelson court was presented with an appeal from a grant of a preliminary injunction rather than an appeal from a decision on the merits. Resp. 7, 8. The court of appeals in this case made no such distinction in reaching its decision. In fact, the court of appeals adopted the Nelson court's assumption that "petitioners are entitled to the protections of the Due Process Clause in the adjudication of their SAW applications...." Pet. App. A10. The court reached a different conclusion because, unlike the Eleventh Circuit, it

premised its analysis under Mathews v. Eldridge, 424 U.S. 319 (1976) on the proposition that petitioners' status, i.e., "fac[ing] the government in a posture more similar to that of immigrants requesting...admission at the border than that of aliens defending the legality of their presence in the country at a deportation hearing," did not entitle them to an interpreter at government expense. Pet. App. A10. The court further viewed petitioners as affirmatively seeking a governmental benefit, therefore obligating them "to make appropriate arrangements to establish the proof necessary to meet their burden with the government." Pet App. A11. It is significant that, in weighing the third Mathews factor, the court failed to consider that the 1.3 million SAW applicants were each required by the government to pay $185 for, among other things, a face-to-face meeting with the government. Petitioners simply do not speak "huge number of languages" as the court of appeals suggests. Pet. App. A13. The cost of interpreters in the principal four languages of petitioners could have been covered by the more than 240 million dollars that the government collected from them or, if that were not sufficient, by increasing the application fee in the first instance.

In response to petitioners' argument that the government could at least have given petitioners advance notice that they were obligated to bring their own interpreter to the interview, the government urges that SAW applicants, unlike asylum applicants, are not entitled to advance notice because asylum applicants are subject to immediate referral for removal proceedings if their asylum application is denied. Resp. 11, 12 fn. 5. There is no qualitative difference between an asylum applicant and a SAW applicant in terms of status. Both sets of applicants seeking a governmental benefit are unlawful aliens who have "affirmatively petitioned the government for a status enhancement." Pet. App. A11. Unless their statuses are enhanced, they remain here unlawfully, always subject to removal proceedings at the government's election.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Linda Kenepaske
Attorney for Petitioners
275 Madison Avenue
New York, N.Y. 10016
(212) 986-5993

Of counsel:

Robert A. Murtha, Jr.
Helene Chowes

Dated: March 20, 2000